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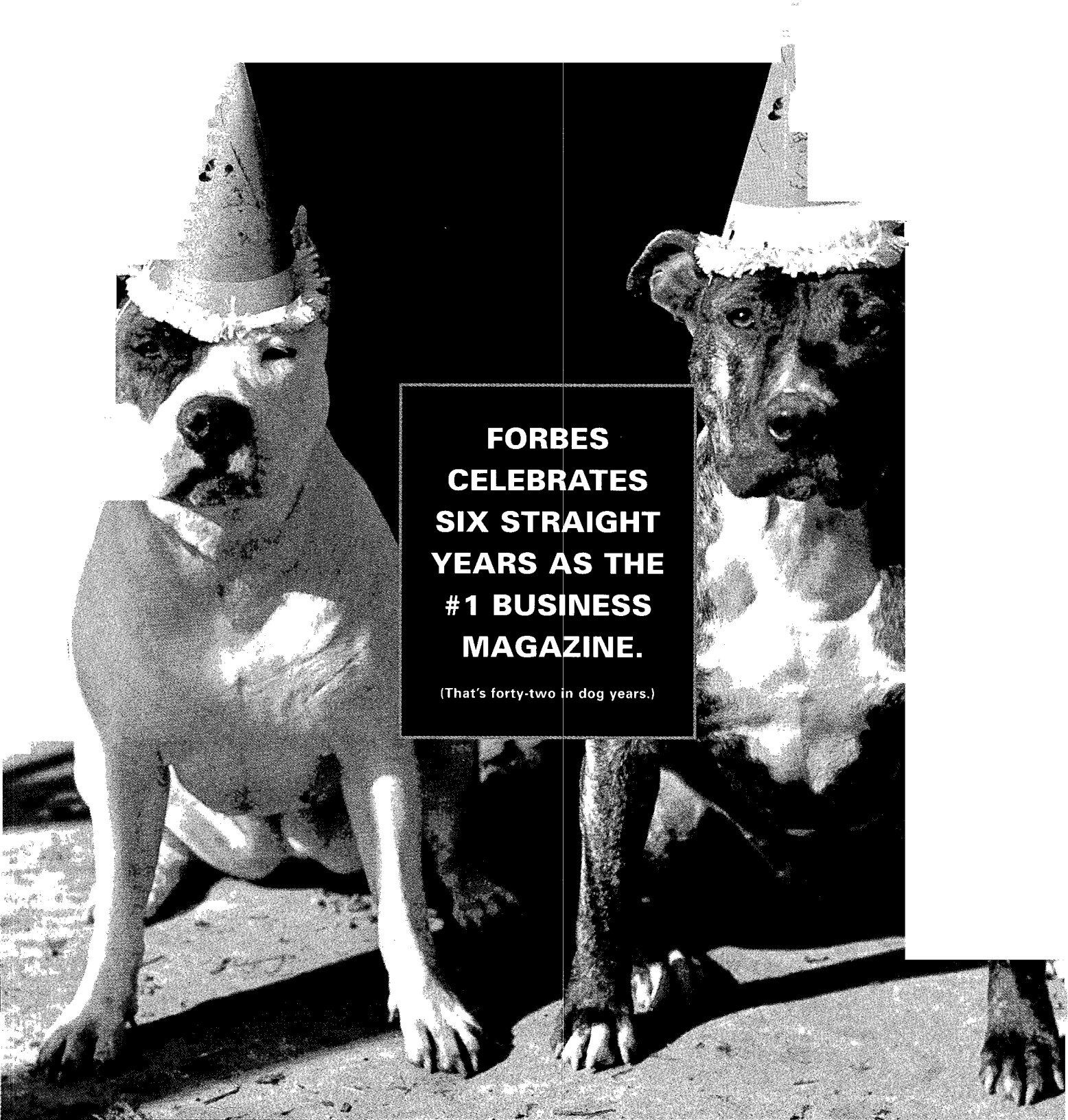

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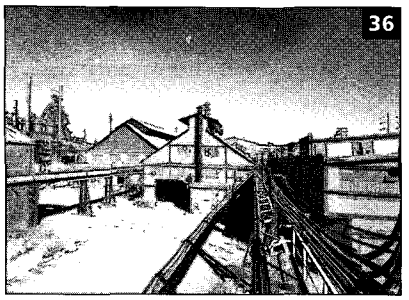

REASON (ISSN 0048-6906) is published monthly except combined August/September issue by the Reason Foundation, a nonprofit, tax-exempt organization, 3415 S. Sepulveda Blvd., Suite 400, Los Angeles, CA 90034-6064. Periodicals postage paid at Los Angeles, CA, and additional mailing offices.

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Unions Forever?

A new vision for America's workers

By Virginia Postrel

After a brief boost following the United Parcel Service strike, American labor unions continue to struggle. With individual workers increasingly able to strike good deals for themselves, and flexibility valued highly by both employees and employers, traditional union solidarity and detailed rules are neither as popular nor as successful as they once were.

Meanwhile, Republicans are turning up the heat on unions' political activities. On the June ballot in California is an initiative that would prohibit the use of union dues for political activities without the express permission of the dues-paying member. At least 14 other states will consider similar initiatives this year, and proponents hope to increase that count to around 40. Such restrictions are not merely a matter of partisan politics: They challenge the very idea of union solidarity, suggesting that individual members' preferences matter.

And in late February, union members voted to reject a contract that would have settled the six-year contract dispute between Caterpillar Inc. and the United Auto Workers. During the bitter strike, some 4,000 workers, out of 13,000, have crossed the picket lines, and the company has maintained operations at surprisingly high efficiency. Many observers believe the company may eventually move to decertify the UAW as the representative of Caterpillar employees. Early in the Caterpillar strike, Virginia Postrel considered the role unions might play in a free and dynamic economy. As she completes her book, The Future and Its Enemies, *we reprint that editorial from June 1992.*

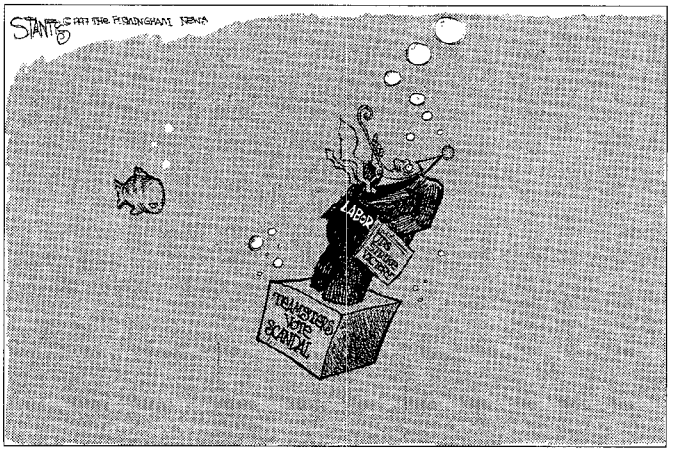
Federal Express. MCI. Microsoft. Wal-Mart. *USA Today.* Nucor Steel. Apple Computer. Cable News Network.

These companies have two things in common: They represent the future of American enterprise. And they are not unionized.

Indeed, it is hard to imagine a company built on innovation, flexibility, and teamwork that could survive the rigid job categories, work rules, and periodic games of labor-management chicken that characterize union shops. So the question arises, Are unions obsolete? Or have they just been battered by greedy bosses and union-busting Republican politicians?

We've heard a lot of the second charge lately. Unions' share of the work force has been steadily shrinking since its 1945 peak of 35.5, falling to 16.1 percent in 1990. But commentators like to mark unionism's decline from 1981, when Ronald Reagan fired striking air traffic controllers.

Reagan's legacy was often invoked when Caterpillar's perennial contract dispute turned into Caterpillar's perennial strike (nine since 1944). The company threatened to hire permanent replacements for striking workers. And in negotiations, management sought to do two things unthinkable in traditional labor contracts: to pay new workers on a lower scale than current employees and to base the new contract on Caterpillar's particular circumstances rather than follow the pattern set by John Deere. That threat and those demands struck at the union movement's central tenets.



SCOTT STANTIS

The rhetoric of solidarity has long obscured the reality of unionism: Unions drive up wages by pitting workers against workers, insiders against outsiders. Through a combination of social sanctions, physical intimidation, and government favoritism, a union maintains a worker cartel. That's why hiring permanent replacements is management's most powerful weapon and why union allies in Congress want to outlaw it.

Union supporters like to talk about the "right to strike" as a basic principle of democracy. But it's an awfully fuzzy one. In labor law, it means you can quit your job, in concert with your fellow workers, and get it back later—sort of. Whether your employer has to give you the job back depends on a lot of mind reading by government officials. Were negotiations "at an impasse"? Was management "bargaining in good faith"? Was the union?

The real right to strike is something very different from a guaranteed job. It means, quite simply, the right of workers to withhold their services at the same time, without fear of civil or criminal sanctions. As such, it is a fundamental right of free people.

And it is a potent bargaining tool. Few private employers can afford simultaneous 100 percent turnover, even temporarily, so a strike threat encourages negotiations. And once a strike is on, resolving it is almost always preferable to training a whole new work force, at least if workers have any special skills. Were the air traffic control system subject to market pressures, firing the strikers would have been much harder and banning them for life inconceivable.

Thinking of the right to strike in this way suggests the fatal flaw in traditional unionism, and a direction for a reborn union movement. Old-fashioned unionism pretends that all workers

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Advertising Sales
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7514 Wisconsin Ave., #350
Bethesda, MD 20814
301-215-6710 Fax: 301-215-7704

Circulation Service
P.O. Box 526
Mt. Morris, IL 61054
1-888-REASON-8 (1-888-732-7668)
(subscribe@reason.com)

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are the same, that the only difference among them is whether or not they enjoy union privileges. Insiders are valuable, outsiders worthless, but all insiders are equal. Only seniority distinguishes them.

To see the absurdity of this notion, consider the nation's largest union, the National Education Association. Anyone who has ever been a student, parent, or teacher knows that some teachers are extraordinary, some mediocre, and some abysmal. But in defense of union egalitarianism, the NEA attacks every public policy that would reward good teachers or screen out bad ones. On an individual basis, it fights just as hard for an incompetent teacher as for an exemplary one—harder if the bad teacher has seniority.

Treating employees as interchangeable is not only degrading to good workers and infuriating to good managers, it is an invitation to hire permanent replacements. If the only difference is the union label, you might as well pay less.

This notion of employees as homogeneous mush carries over into unions' view of industry. Nowadays, union leaders like to draw damning comparisons to Japanese companies with lifetime employment and greater equality between management's and labor's pay. But U.S. unions eschew the company identification that makes that system work. They do not want workers at competing companies to see themselves as competitors rather than brother unionists.

Hence the zeal for pattern bargaining, which establishes a floor for wages and other contract terms. Under pattern bargaining, neither a company's conditions nor the skill of its workers is as important as the industry to which the union has assigned it.

Caterpillar, which makes mostly construction equipment and exports 60 percent of its output, is arguably not in the same industry as Deere, which concentrates on farm implements and sells mostly domestically. Breaking the pattern is far more important to the company's future flexibility than any specific dispute over wages and benefits. And what better time to make such a demand than in the midst of a recession that shoved Caterpillar $404 million into the red last year and pushed local unemployment to 9 percent?

Fortunately for Caterpillar workers, they are *not* the same as either workers off the street or Deere employees. They are highly skilled both in their trades and in their specific knowledge of Caterpillar's production. And they are well paid. In this eyeball-to-eyeball confrontation, a federal mediator made both sides blink.

American unions face a choice. On it depends their future.

They can continue to pursue their current course, taking their old-fashioned ideology to the only workplaces where it still applies—the monopoly shops owned and operated by government. Or they can reinvent unions as organizations that primarily serve workers rather than fight management.

The first is the road to short-term gains and long-term disaster. Public-employee unions have it easy at the bargaining table. Their opponents are politicians who can collect from the "customers" whatever the union demands; taxpayers, unlike car buyers, have no choice. Already, the NEA has displaced the Teamsters as the nation's largest union. The American Federation of State, County, and Municipal Employees is number four, surpassing the autoworkers.

But this strategy casts union members not as the hard-working salt of the earth but as another special interest group ripping off the taxpayers, most of whom also work for a living. It will create both a tax revolt and a backlash that will taint all of organized labor.

And, as the air traffic controllers can testify, it is a lot easier for a resolute politician to fire a bunch of highly paid public employees, and to survive the dislocations of retraining a whole new work force, than it is for a company manager to clear the assembly lines. The government employer faces no competitors with well-trained workers, the public is more sympathetic to management that represents taxpayers, and plenty of replacements will cross the picket lines.

Rather than commit suicide this way, unions can adopt an entrepreneurial vision. Instead of treating workers as indistinguishable factory drones, they can offer them skills that will command both respect and high wages. That means getting into the training business—a business companies often neglect for fear of invest-

ing in workers who will then move on to other jobs. As umbrella organizations supported by dues, unions wouldn't face that disincentive.

And "training" does not necessarily mean "retraining." It means continuous improvement of employed workers. It means helping people keep up with new technologies, new equipment, new quality techniques. And, given the state of American education, it means reading, writing, and arithmetic—and English lessons for the foreign born.

In a working world where upward mobility often depends on literal mobility, national unions can offer other services to their members: portable benefits tied to the person rather than the job; a national "hiring hall," a computerized listing of job openings; loans to pay for relocation; a community in a new town. The list is limited only by worker needs and union creativity. The point is to invest in workers and to help workers collectively invest in themselves, to make union workers especially valuable to employers and unions especially valuable to employees.

Achieving such a vision requires a fundamental change in the way unions see themselves. Such change is difficult—far harder than picking political fights. But the alternative is an ignominious death.

Clipping Encryption

The White House wants the keys to your computer.

By Rick Henderson

President Clinton raised a few eyebrows when he announced his support for the Internet Tax Freedom Act, a bill that would place a six-year moratorium on new taxes that apply only to the Internet. The National Governors Association had stridently attacked the bill, and the group assumed its old colleague from Arkansas would follow suit.

Clinton cited the "remarkable growth" of commerce on the Internet and his desire to help "further its growth" as reasons for supporting the tax moratorium. And the president is right to be concerned that the nation's 30,000 state and local taxing authorities could strangle electronic trade with new levies. But there's another set of policies the Clinton administration supports that has shackled the development of Internet commerce and hampered the Net's use as a communications tool: controls on data encryption.

Encryption programs are mathematical formulas that scramble messages sent over data networks. Effective encryption could make any electronic message—e-mail, cell-phone call, or wire transfer—indecipherable to anyone except the sender and the intended recipient. As more people rely on computers, the demand for security in cyberspace will skyrocket.

In an online world, encryption can be an effective way for people to enhance their security. And the Fourth Amendment to the Constitution affirms the right of all individuals to "be secure in their persons, houses, papers, and effects against unreasonable searches and seizures." But the Clinton administration and its allies in law enforcement don't want your communications to be private. With this in mind, the Department of Commerce recently established the President's Export Council Subcommittee on Encryption, a 20-member panel with representatives from law enforcement agencies, high-tech companies, and financial institutions that will advise the White House. This group won't be debating the merits of strong encryption; instead, it will merely rubber-stamp proposals to compromise your privacy that the administration has been hawking unsuccessfully for six years.

Whenever possible, the Clinton administration has conducted discussions about encryption policy away from public scrutiny. The panel will continue that practice. The Web site operated by the Department of Commerce (www.doc.gov) doesn't list the subcommittee, its mission, or its members; nor does the main White House Web site (www.whitehouse.gov). An article in the *CyberWire Dispatch* newsletter notes that "all members have received security clearances, and some future meetings will be closed to the public."

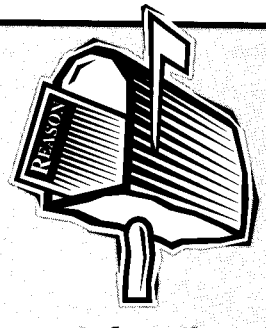
Despite the importance of the subcommittee's work, it has garnered little attention from the mainstream press. One week after the panel's first public meeting on February 23, a Nexis search listed only three references to the group: a press release issued by one of the corporate members and two notices of the meeting in a federal daybook for reporters. No major news service covered it.

But if encryption policy is set behind closed doors, the privacy of every law-abiding American will be left to the whims of regulators, cops, and spooks. Current controls date back to the Cold War, when encryption was treated like a weapon. The Department of Commerce now regulates encryption, and it has relaxed some controls. But the restrictions have frozen a fast-moving technology in place, making it vulnerable to hacker attacks. And the feds aren't interested in loosening their grip on encryption without a struggle.

Consider key recovery, the Clinton administration's latest plan to monitor the communications of anyone who uses online services or wireless phones. Users of key recovery software would have to deposit the "keys" that scramble and unscramble their messages with a "trusted third party" (something resembling an escrow agency) which the government could approach if it wanted to intercept private transmissions.

Buying key recovery software to protect your cell phone or your e-mail would be no different from giving government agents the key to your house and trusting that they will never drop by unannounced. It's an invitation for law enforcement agencies (including tax collectors) to monitor anyone who uses encryption.

And if you think constitutional guarantees would protect your privacy as long as you keep your nose clean, you haven't been reading the key recovery proposals Congress is considering. One bill would allow the cops to acquire your keys if they obtained an easy-to-get subpoena, rather than the search warrant typically required to tap a telephone conversation or bug a location for sound. Another would make the mere possession of encryption software that doesn't contain key recovery features



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(such as the readily available Pretty Good Privacy programs) a criminal offense. The National Sheriffs Association, whose president is a member of the new encryption panel, wants the cops to have access to encrypted messages at any time, without having to go through the inconvenient process of getting a search warrant, or even a subpoena. FBI Director Louis Freeh has testified frequently before Congress, saying that the administration would demand key recovery provisions as part of any new encryption law.

Law enforcement officials claim that allowing strong encryption will prevent them from stopping terrorists, drug dealers, and pedophiles. But criminals won't apply for export licenses—and they won't hand their encryption keys over to a government-friendly third party. Secure encryption can help make sure that the Fourth Amendment remains as important in the online world as it was in the days of quill pens and inkwells.

In Memoriam: Julian Simon

Julian Simon, professor of business administration at the University of Maryland, died February 8 of a heart attack at age 65. Simon was an energetic scholar and booster of a pro-human, pro-technology, pro-progress vision of the future, based firmly on the best data of the past. In his many books, from his account of *How to Start and Operate a Mail Order Business* to the scholarly *Theory of Population and Economic Growth*, Simon sold optimism—an optimism backed not by airy wishes and hopes but by facts, and those facts backed by a theory. That theory is best expressed in the title of his 1981 magnum opus and its 1996 sequel/update: *The Ultimate Resource*. The ultimate resource, Simon said, is human beings. Not only aren't there too many of us; there aren't nearly enough.

"The main fuel to speed the world's progress," wrote Simon in the introduction to the 1995 collection *The State of Humanity*, "is our stock of knowledge; the brakes are our lack of imagination and unsound social regulations of these activities. The ultimate resource is people—especially skilled, spirited, and hopeful young people endowed with liberty—who will exert their wills and imaginations for their own benefit, and so inevitably they will benefit the rest of us as well."

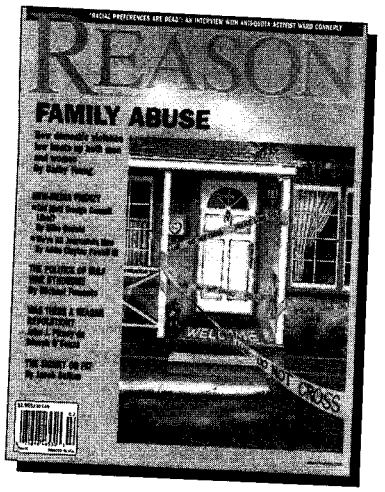
The mass of data he accumulated told the story: It showed infant mortality falling, life expectancy rising, agricultural prices falling, arable land rising, the number of people fated to agricultural toil falling, air quality improving. There can and will be temporary and local bumps, but the long-term universal trends are positive.

In a world where doomsayers make bestsellers out of predictions of manmade horror that always proved untrue, this was a courageous and lonely stance. But Simon was not afraid to put his money where his mouth was. He made a famous bet with archdoomsayer Paul Ehrlich that a cohort of five natural resources of Ehrlich's choosing would be cheaper in inflation-adjusted terms at the end of the '80s than at the beginning. Simon won the bet. Ehrlich won the MacArthur "genius grant."

Simon was himself a great resource—not natural, but manmade. He struggled with debilitating depression for part of his life, but through his respect for data and for human accomplishment, he turned himself into a beacon of cheer for those not afraid to look at the future, a beacon that illuminated a worthwhile and eminently livable world, as long as people were free to use their ingenuity. Simon shone for abundant life and freedom. He showed how they mattered, how they made things better for us all.

I once edited a piece he had written for *Regulation* magazine on his key role in instituting the system whereby airlines offer incentives to get people off overbooked flights. I wrote to thank him both for that achievement and for the fine article. He wrote back thanking me for thanking him, saying that "it matters, very much." He enclosed, in a typically charming Simon touch, a lovely fall leaf from his backyard. Julian Simon's life and accomplishments mattered, very much.

—**Brian Doherty**



Domestic Squabbles

Cathy Young's article on domestic violence laws ("Domestic Violations," February) did a good job of revealing the commonplace denials of constitutional rights that the accused face in "domestic" assault cases. There is, however, one frequent problem which Ms. Young has missed.

In my criminal defense practice, I have found that judges frequently order defendants to attend counseling as a condition of pre-trial release. Another condition is to sign releases so that pre-trial release supervisors can monitor compliance.

The problem is, counselors all say that to provide counseling to a "batterer," the batterer has to admit that he has committed the acts of which he is accused. In other words, in order to be released pending trial, an accused batterer has to confess to the crime. Last time I checked, this was a violation of the Fifth Amendment.

Ms. Young commented, "The assumption behind no-drop [prosecution] policies is that when women recant or refuse to press charges, it is out of fear or dependence." I have seen evidence of this assumption, and one prosecutor even admitted it to me. When I told the prosecutor that the "victim" was going to testify that my client had never touched her, the prosecutor told me that any woman who comes in the day of trial and claims that she was not assaulted is lying. Apparently, alleged victims always tell the truth when they claim to be assaulted but always lie when they deny the assault took place.

Matthew Pollack
Topsham, ME

My only quibble with Cathy Young's article is that her brief reference does not describe the huge injustice done by the (1996) "Lautenberg Amendment" to the Gun Control Act of 1968. Not only does this law permanently revoke an enumerated civil right for a misdemeanor conviction, it's retroactive!

If you were convicted (or copped a plea and paid a small fine or took a class, in addition to the time you had already spent in jail, to avoid a ruinously expensive trial) many years before this law was passed, you now can never again buy a gun. You must immediately get rid of any you had legally owned.

No target rifle, no duck-hunting gun, no gun to keep in your home or place of business—no matter how weak or strong the original case was, how long ago, how clean your record ever since, or how pressing your need. If you're a law enforcement officer, you're now out of a job, or at best on permanent administrative duty.

In what other case can the punishment for a crime be increased years after the verdict is rendered and the sentence imposed—by a law that didn't exist when the offense occurred?

Of course domestic violence really happens, and when it does it's horrible. We shouldn't go back to the bad old days where it was often ignored until somebody was killed. What to do, then?

When the facts indicate, treat domestic assaults like the felonies they are. Let the full weight of the law, and all the constitutional protections for the accused, come into play. In minor or unclear cases, intervene as necessary. But we should not trash constitutional rights with ill-considered, feel-good remedies.

Dean McCormick
Cedar Creek, TX

Thank you very much. As a loyal subscriber to REASON and a men's rights activist, I found Young's analysis painfully right on target. Young brought the personal and political together in an accurate tale of woe.

The popular media cannot run any longer from the facts that Young reveals with both compassion and common sense: The "arrest the biggest party on domestic calls" mandate is biased; the rise in restraining orders reflects an increase not in abuse but in the use of such orders by possessive mothers to ditch the child's father for good; and feminism based on gender rather than equity has harmful effects we all feel.

Young struck a raw nerve with me in detailing the "consequences of a restraining order." Year after year, good men like me can spend our own time and money petitioning the court with pleas for "more" time with our children (in Massachusetts, if you are an unwed father your child basically belongs to the mother and state), only to be trumped when, after discovering she will be brought into court to explain why father and child are not spending time together, the mother files for a restraining order and that hearing comes before the long-awaited visitation hearing.

I applaud REASON for publishing Cathy Young's blazing article. I hope it enrages readers to the point of taking action. The horrors of the family law courts need to end.

Tony Lizza
Marietta, GA

Weighty Questions

Jacob Sullum's review of Michael Fumento's *Fat of the Land* and Richard Klein's *Eat Fat* ("Fat Chances," February) was disappointing since it didn't address head on the dispute between Fumento

and Klein over the evidence that obesity contributes to increased mortality. This is important because in his zeal to attack gluttony, Fumento appears to directly contradict previous claims he has made about the reliability of epidemiological studies to measure increased mortality.

In a 1995 op-ed piece, for example, Fumento refers to a study that found secondhand smoke was associated with a 19 percent increase in mortality and concludes, "At the time, many people including myself criticized the EPA report, saying [with] such a small apparently increased risk (so tiny, in fact, that the medical community has rejected much larger ratios as being conclusive on other potential carcinogens)...that the tiniest problem could throw the whole thing off."

But now Fumento apparently accepts American Cancer Society claims that men 19 percent overweight have a 15 percent increased likelihood of death. What ever happened to the difficulty with "such a small apparently increased risk"?

Fumento also repeats the claim that 300,000 people die every year from obesity, but as Marcia Angell wrote in a recent *New England Journal of Medicine* editorial, "[A]lthough some claim that every year 300,000 deaths in the United States are caused by obesity, that figure is by no means well established. Not only is it derived from weak or incomplete data, but it is also called into question by the methodological difficulties of determining which of many factors contribute to premature death."

As Steve Milloy of The Advancement of Sound Science Coalition put it, the 300,000 figure is "classic junk science." Apparently the limitations and difficulties of epidemiology, which Fumento discusses so well in his book *Science Under Siege*, are irrelevant when one strikes out on a crusade to save people from themselves.

Brian Carnell
brian@carnell.com

Reviewer Jacob Sullum seems to buy Michael Fumento's claim that we should lose weight and live longer. This is one of the most widely believed erroneous ideas that is debunked in my book, *Things You Know That Are Not So: A Digest of Erroneous Popular Wisdom on History, Science, Health & More.* Losing weight does improve blood pressure, cholesterol levels, and other markers for health. Despite this, dieters die sooner.

A 32-year study of Dutch men showed the leanest men had the highest mortality. A Finnish study found the lowest mortality at a body mass usually considered obese. A Kaiser Foundation study found no increased mortality associated with weight. A study published in the *American Journal of Epidemiology* (September 15, 1992) reported that dieters who lost over 15 percent of their weight increased the risk of mortality by two times over those with little or no weight loss. Even studies that headlines claimed associated higher obesity with increased mortality actually produced raw data that show the opposite.

A widely publicized report in the *New England Journal of Medicine* (September 14, 1995) said the lowest mortality was observed in women weighing at least 15 percent below the U.S. average. The actual data in the report showed that mortality was lower for women who were as much as 50 percent over the optimal weight. The researcher had discarded 68 percent of the deaths. Even if her selection was scientific and valid, the conclusion was not valid for over two thirds of her subjects.

The same issue had another study which said, "Men losing 4.5 kg had, independently of the level of weight at the base line and the confounders, a significantly elevated risk of death from noncardiovascular and noncancerous causes and from all causes." This study, as most studies published in refereed professional journals, shows higher mortality associated with losing weight.

The food police have unconsciously encouraged dangerous anorexia and bulimia. They have actually increased obesity because dieting rarely lasts. Most dieters gain back more than they lose. The pressure on dieters has created an environment of prejudice and guilt. Shortcuts encouraged by the food manufacturers, weight loss groups, and bariatric physicians cost much time and wealth, yet end up also costing longevity.

No doubt Mr. Fumento is well-meaning, but he will not improve our mortality by adding to the pressure. A lifetime of brussel sprouts and low-fat foods may not last longer, but it will seem longer.

David Moshinsky
davmos@bellatlantic.com

I read and greatly enjoyed the review of the books on fat. However, I would like to make two points.

First, the Rubens stuff is a widely misused myth. Yes, he painted fat women, but he was unique even in his day. True, fads do change from time to time, as with the latest body-piercing craze. However, that doesn't mean every man, or even a substantial fraction, now desires a woman with a nose ring, where we did not previously. It is just a passing fashion.

Bottom line, despite passing fads, men's ideal of desirability has not dramatically changed over tens of centuries. At no time or place did men find obese women to be more desirable than 36-24-36. Rubens wasn't painting erotica, and an abundance of images of "attractive" women throughout the ages demonstrates a fairly constant ideal of feminine beauty.

Second, I have wondered about the "calories are all that counts" argument, but have never seen a serious discussion of it. In the simple model, calories in = calories burned + calories stored (as fat). If this is true, a calorie is a calorie, regardless of the source. I am not a biologist, but I suspect that this simple model is wrong. I would expect the body to be able to dump excess calories in the urine. If this is so, the form of the foodstuff in the bloodstream may influence whether it is stored or discarded. I would be interested in knowing if you are aware of any such mechanism for calorie dumping.

Thomas Cunningham
Pasadena, CA

Jacob Sullum replies: Brian Carnell shows appropriate skepticism in asking how we know that the associations between obesity and various diseases represent cause-and-effect relationships. To make that judgment for a given health risk, you need to look at several factors: How strong is the association? Is it consistent across studies? Does the risk rise

steadily with weight? Is there a plausible biological mechanism? Have alternative explanations for the association been ruled out?

I have not examined the evidence about the health risks of obesity closely enough to answer those questions. But Michael Fumento has, and since he has shown a keen awareness of epidemiology's limits in his previous work, I tend to give him the benefit of the doubt when he says that a particular risk is well-established.

Then, too, Richard Klein does not offer a very rigorous rebuttal of the view that obesity is hazardous. In any case, I did not mean to endorse Fumento's conclusions on this point, only to accept them for the sake of argument.

As for the figure of 300,000 obesity-related deaths a year, all such death tolls should be taken with a tablespoon of salt. As tricky as teasing causation from correlation can be, estimating the magnitude of each risk and applying it to the general population is fraught with even more uncertainty.

Since I have not delved into the literature, I cannot address the studies that David Moshinksy cites (though I am sure Fumento would be eager to do so). One point to keep in mind, however, is that an association between weight loss and higher mortality could be due to the fact that sick people tend to lose weight—a complication that Klein fails to consider.

Thomas Cunningham is probably right that our ancestors' admiration for fat is often exaggerated, but Klein does make a convincing case that standards of beauty have changed noticeably, if not "dramatically," over the years. Though "Rubens wasn't painting erotica," his nudes were not intended to be repulsive either, and he is not the only artist to present such figures in a positive light.

Regarding the fat-vs.-calories issue, Fumento concedes that "dietary fat converts more efficiently to body fat than does carbohydrate or protein" and that carbohydrates are "almost always burned off immediately as fuel." But he argues that the practical significance of the first point is nullified by the second: "It doesn't really matter that carbohydrates convert less efficiently to body fat, since that conversion rarely takes place at all."

If you eat excessive amounts of carbohydrates, Fumento says, all your dietary fat will be converted into body fat instead of being burned for energy, and none of your existing body fat will be lost. That is why he insists that calories are the bottom line.

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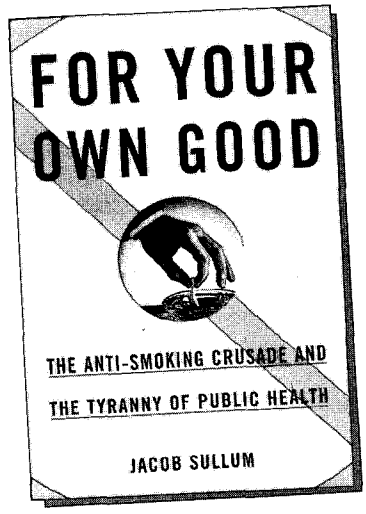

In ***For Your Own Good,*** award-winning journalist Jacob Sullum examines the major themes of the anti-smoking movement, showing that tobacco's contemporary opponents echo complaints first expressed centuries ago. Today, under the banner of "public health," they say the government has a right and an obligation to eliminate tobacco consumption once and for all. Sullum argues that such a use of state power is illegitimate and dangerous, threatening the freedom of anyone who dares to trade longevity for pleasure.

*"*For Your Own Good* is one breath of fresh air that the anti-tobacco puritans will hate. Jacob Sullum has written a lucid and mordant exposé of their neurotic agenda that is sure to make him the hero of smokers and our liberty-loving allies."

— Florence King, *National Review*

"Jacob Sullum shows us where the crusade against smoking—the leading medical heresy of the moment—is leading us. Rejecting the anti-smoking crusade is every bit as important for the health of the body politic as rejecting smoking is for the body anatomic."

— Thomas Szasz, professor of psychiatry
SUNY Health Science Center
Author of *Ceremonial Chemistry*

"A highly readable yet encyclopedic account of anti-tobacco activism from the blast by King James I in 1604 to the latest outpourings by Kessler and Koop."

— Milton Friedman, Nobel laureate in economics
Senior fellow at the Hoover Institution

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Funny Numbers

By Michael W. Lynch

Reps. Billy Tauzin (R-La.) and Dan Shaefer (R-Colo.) want Americans to exchange the income tax for a 15 percent tax on "gross receipts" from the sale of goods and services. Under the Tauzin-Shaefer bill, if you purchase a $100 outfit for your spouse, you would pay $117.60.

Wait, you say, a tax of $17.60 on a $100 purchase is a rate of 17.6 percent. Not if Congress enacts the Tauzin-Shaefer sales tax bill (H.R. 2001), which defines "gross receipts" as a consumer's total out-of-pocket expenditures, including the sales tax itself: The tax rate on the outfit is 15 percent, according to this view, because $17.60 (the tax paid) is 15 percent of $117.60 (the price of the clothing plus the tax).

A spokesman from Shaefer's office says this calculus maintains "intellectual integrity," since it allows an easier comparison with flat tax proposals. Under a 15 percent income tax, for example, you would have to earn $117.60 to buy a $100 outfit. While this position may be defensible, it looks a lot like an attempt to lowball the rate and make the Tauzin-Shaefer bill more politically palatable, since most people assume a 15 percent "sales tax" would add $15 to the price of a $100 purchase rather than $17.60.

This point is not lost on Brookings Institution Senior Fellow William Gale. "It's fine to calculate the rate this way for comparison with the income tax," says Gale. "But they should tell people their 15 percent sales tax means people will pay 17.6 cents on the dollar. This they never do."

Photo Flap

By Brian Doherty

It began as a private pressure campaign against a pair of art photography books. But it has turned into serious criminal indictments against Barnes & Noble.

Last year, two prominent Christian activists, James Dobson of Focus on the Family and Randall Terry, founder of the anti-abortion group Operation Rescue, began condemning the works of Jock Sturges and David Hamilton, both of whom have photographed nude children. Protests, including the willful destruction of unbought copies of a Sturges book in Barnes & Noble stores, hit about 40 cities.

In November, protests morphed into prosecutions. A grand jury in Tennessee indicted the bookstore chain on the misdemeanor charge of distributing "material harmful to minors" without keeping it wrapped in plastic (to prevent browsers from looking at it) and five feet or more off the floor. The books in question are Hamilton's *The Age of Innocence* and Sturges's *The Last Days of Summer* and *Radiant Identities*. All three include nude photographs of children, but none of them are in sexual situations.

In February, two criminal indictments for violating child pornography statutes were brought against Barnes & Noble in Alabama for selling *Radiant Identities* and *The Age of Innocence*. Between the two indictments, Barnes & Noble faces 35 counts, with a potential $10,000 fine per count.

In further action, a citizen petition in Kansas has led to an inquiry by a special prosecutor and a grand jury into whether selling Sturges's books violates child porn laws. California Assemblyman Bruce Thompson is proposing a state law with second-offense fines of up to $10,000 for selling books presenting kids engaged in what he defines as "sexual conduct." And UPI reported on February 18 that the U.S. Justice Department is investigating the works of Sturges and Hamilton for

Balance Sheet

By Rick Henderson

ASSETS

▲ **Elder Statesman.** A key Democrat may stifle President Clinton's plan to let nonretirees "buy" Medicare coverage. Clinton pal Sen. John Breaux (D-La.), head of a bipartisan Medicare advisory panel, tells *The New York Times* Congress shouldn't rush to expand Medicare coverage in an election year, "when it will become a political football."

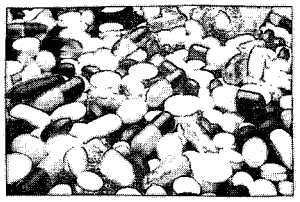
▲ **Juiced.** El Salvador concludes Central America's first electricity privatization. Ownership groups from Chile, Venezuela, and the United States pay nearly $600 million for majority shares in El Salvador's four electric utilities.

▲ **Access Denied.** Bill Clinton backs the Cox-Wyden Internet Tax Freedom Act, which would declare a six-year moratorium on new cyberspace taxes. Citing the chaos that could result if 30,000 governing authorities taxed online services, Clinton tells a high-tech conference in San Francisco, "We can't allow unfair taxation to weigh [the Internet] down."

▲ **Good Gridlock.** Potentially unconstitutional limits on political speech (a.k.a "campaign reform") may be dead for one more year. Procedural hurdles and killer amendments crafted by Senate Majority Leader Trent Lott (R-Miss.) keep the McCain-Feingold bill off the legislative agenda indefinitely.

CHAS GEER

▼ Drug Slug. From staplers to aspirin, the government's war on commerce continues. The Federal Trade Commission rejects proposed mergers of drug wholesalers Bergen Brunswig Corp. with Cardinal Health and McKesson with AmeriSource Health Corp. The two new firms would have owned 80 percent of the U.S. wholesale drug business, a concentration the FTC considers monopolistic.



▼ Stadium Scam. Arena frenzy continues in Texas. (See "Edifice Complex," August/September.) Dallas voters agree to pay more than half the cost of a $230 million facility for the NBA Mavericks (owned by Ross Perot Jr.) and the NHL Stars. And the Harris County Sports Authority approves a construction contract for a $230 million site for baseball's Houston Astros.

▼ Bets Off. A U.S. attorney in New York indicts 14 U.S. citizens operating Internet gambling services that are headquartered in Central and South America. Janet Reno claims all Internet gambling is illegal, citing laws dating from Al Capone's heyday that make transmitting gambling information by phone a federal crime.

▼ Laser Tag. The national ID card is here. More than 5 million Mexicans who frequently cross the U.S. border to conduct business or visit relatives must now carry "laser visa" cards. The cards, which contain digital photos, fingerprints, and other personal information, are a model for the ID cards all Americans must soon have.

LIABILITIES

child porn violations as part of an FBI undercover operation known as "Innocent Images."

Sturges's work was the subject of a 1991 anti–child porn crusade in San Francisco, but the grand jury refused to indict. His work appears in many museums, including New York's Metropolitan Museum of Art.

The leaders of the campaign against Sturges's and Hamilton's books are not subtle about their intentions. Randall Terry told *World* magazine that "we have a moral obligation to be...as intolerant as we possibly can be" of such material. Alabaman David Lackey, who told *The New York Times* he had called the state attorney general's attention to the books, said he hopes that if Barnes & Noble is found guilty, "it will have a chilling effect on the other bookstores in this country."

Wallet Surgery

By Carolyn Lochhead

A terrible oversight has occurred. Last November 14, "a tremendous victory for all Americans" was achieved. Yet most Americans don't know about it, even though they've made a $500,000 down payment on it and will be paying a lot more down the road.

The victory was a law creating a "National Health Museum." The museum's promoters have assured the public that a National Health Museum is just what America needs, and Congress and President Clinton have agreed. Backers hope to spend $200 million to build a grand structure on or near the Washington Mall.

In Washington, $1 billion is pocket change, so $200 million goes completely unnoticed. Still, it would take 20,000 taxpayers paying $10,000 each to come up with the cash. It's also enough money to buy up all the remaining rain forest in Costa Rica.

The health museum's main promoter is the irrepressible C. Everett Koop, the former surgeon general whose bold public stances made him such a household figure that Civil War–style goatees and sideburns threatened to come back in fashion.

The whole venture started when the Pentagon wanted to dump its medical history museum at Walter Reed Medical Center. Koop determined not only to save the museum but to remake it in truly Washingtonian proportions: "Configured at the nexus of the medical and communications worlds of the next century, the Museum will share the triumphs and accomplishments that comprise our nation's medical heritage and provide a glimpse of our collective future," says a Koop press release.

Funny thing, though. Museum promoters avoided publicity when seeking public funds, quietly tucking the item into the "secretary's budget" of the health appropriations bill, where it would have remained unseen were it not for a tip from some killjoy on the House appropriations staff. Backers promise that private money will also be raised.

Some narrow-minded lowbrows like Tom Schatz of Citizens Against Govern-▷

QUOTES

"Man, I can't wait to be governor [of Alabama]. I never realized what you can do with your intern program."
—Perennial NBA all-star forward and would-be politician Charles Barkley

"The fact is, [cigarette companies are] out there encouraging people to break the law. It's one thing for Mohandas Gandhi or Martin Luther King Jr. to encourage people to engage in civil disobedience, and it's another thing to have one of the biggest multinational corporations in the world inciting people to break the law."
—Anti-smoking activist Stanton Glantz, commenting on California's bar smoking ban in *The Washington Post*

"I fought a war to keep this country free. The state didn't buy that bar. I bought that bar with hard work."
—Bill Ostrander, a 70-year-old bar owner in Roseville, California, who faces a $100 fine for letting his patrons smoke

BRICKBATS

♦ A teacher found 6-year-old Seamus Morris giving lemon drops to some of his fellow first-graders at a Colorado Springs elementary school. Apparently mistaking the candy for drugs, officials reacted by calling an ambulance and the fire department to examine the kids, advising their parents to take them to the hospital for tests, and suspending young Seamus.

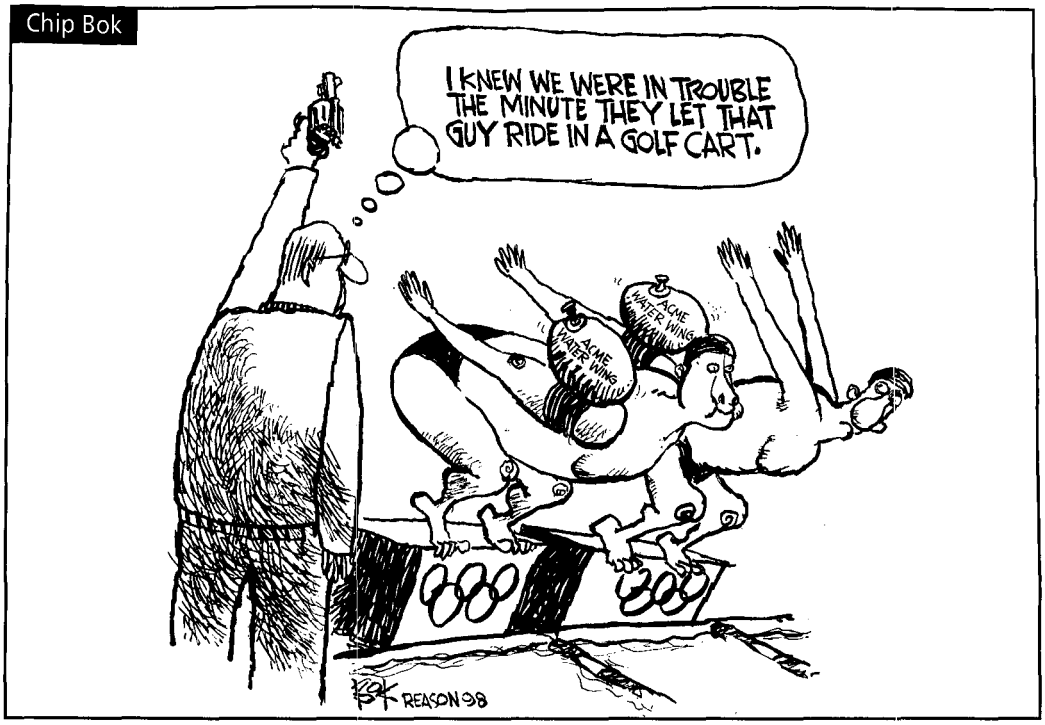
♦ Late last year, Larry Flynt issued free subscriptions to *Hustler* to more than 400 congressmen, senators, and cabinet heads. *Hustler* reports that just 63 refused the subscriptions.

♦ The U.S. Forest Service recently installed dozens of "odorless outhouses" in national forests at a cost of more than $10,000 per outhouse. The buildings pipe out foul air with the aid of solar-powered fans. But the Forest Service placed many of them in areas that are constantly in the shade, making the fans useless.

♦ Last year, the state of Hawaii banned no-holds-barred fighting competitions. Lawmakers called it "human cockfighting." Earlier this year, a committee of the state house passed a bill legalizing real cockfighting. Observers say the bill likely will become law.

♦ A Christian group in Yuba City, California, is trying to get the Ancient Ways store kicked out of the Yuba City Mall. The store sells such things as tarot cards and five-sided stars. The Christians say such items are as dangerous as drugs, pornography, and guns.

Chip Bok

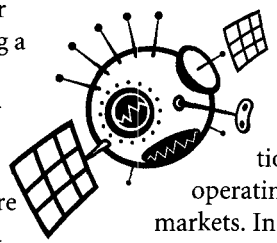


ment Waste deride Koop's grand vision as being "laughable if it weren't true." Oh but it is.

Space Balls

By Michael W. Lynch

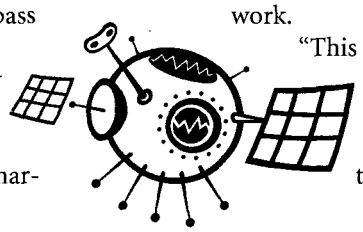
Are the high costs of international phone calls, video conferences, or data transfers putting a dent in your budget? Reps. Tom Bliley (R-Va.) and Edward J. Markey (D-Mass.) want to help. They are pushing H.R. 1872, a bill to increase competition in the satellite sector of the international telecommunications market.

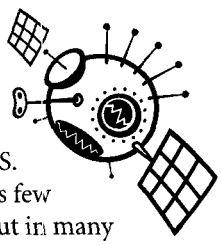


In 1964, a group of 11 nations, led by the United States, created the International Telecommunications Satellite Organization (INTELSAT)—an international corporation chartered by member nations and jointly owned by national signatories, usually agencies affiliated with state-sanctioned telecom monopolies—to provide international telephone and data services. Today, the 141-member INTELSAT operates a network of 24 satellites, providing voice, video, and data connections.

INTELSAT maintains a global network of satellites, selling space on its networks to the signatories. These signatories, in turn, sell access to telecommunications companies operating in national markets. In the United States, companies purchase access through the Communications Satellite Corporation (Comsat), a privately held and tightly regulated national monopoly, which owns 19 percent of INTELSAT.

Companies can't easily deploy private satellite networks to bypass INTELSAT because they need access to customers in local markets. Gaining access to the relatively deregulated U.S. market poses few problems. But in many countries, national telecom monopolies also own stakes in INTELSAT and license companies to operate nationwide. These monopolies aren't eager to allow competition to reduce the prices they charge consumers.





Backed by the Clinton administration and companies eager to compete in the international satellite market, Bliley and Markey's bill seeks to privatize INTELSAT by January 1, 2002, breaking it up into several corporations that can't be owned or operated by monopoly telecom companies. The bill would also end Comsat's exclusive access to the satellite network.

"This bill brings competition to outer space," says Bliley, "and the result will be

ARTIFACT

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Memory Whole

David King's *The Commissar Vanishes: The Falsification of Photographs and Art in Stalin's Russia* (Henry Holt and Company) traces how communist leaders airbrushed, manipulated, and retrofitted photographs, drawings, and even whole buildings to serve ever-changing political needs. As suggested by the photos to the left, in which one-time secret police chief Nikolai Yezhov disappears, the results are simultaneously terrifying and darkly comic.

King's book is far more than just a memorial to the late, unlamented Soviet total state. In our own hyper-mediated age, in which we are bombarded by an endless procession of seamless, self-serving images and possess unprecedented power to create the same, *The Commissar Vanishes* is a reminder that seeing and believing are in no way identical. Its pages are a study in the significance—and vulnerability—of our critical faculties.

As important, by explicating how the Soviets relentlessly doctored their history, King also reminds us that the past, like the present and the future, is never quite a settled matter. Rather, it is a struggle that is renewed daily—and one in which truth remains but one of many possible outcomes.

—Nick Gillespie

better and cheaper international satellite communications."

Crumpling Tissues

By Brian Doherty

Be more careful with tissue transplants, the General Accounting Office warned the Food and Drug Administration in a December 1997 report. The GAO looked at what it considers potentially hazardous gaps in the FDA's current regulation and inspection of human tissue transplants, including musculoskeletal tissue, skin, corneas, reproductive tissue, and peripheral and umbilical-cord blood stem cells.

The GAO stressed the dangers from "potential transmission of infectious diseases from donor to recipient" and "certain tissue-processing techniques that may affect the usefulness of tissues or leave them with harmful residue." It recommended more thorough registration of tissue banks and stricter reporting requirements for problems that arise from tissue transplantation.

As the GAO tells the FDA to be more diligent, elected officials seem poised to stymie a technology that holds great promise in enhancing the safety of tissue transplants: cloning. Rep. Vernon Ehlers (R-Mich.) and Sens. Kit Bond (R-Mo.) and Trent Lott (R-Miss.) have all proposed bills that would, as Michael West of Origen Therapeutics Inc. told the House Commerce Committee, "make it a crime to conduct research if it could possibly be related to the cloning of a human being even if it is not, in fact, conducted for that purpose."

Cloning research holds the promise of replicating, from your own adult cells, large amounts of specialized tissues you could use now or store for future transplant needs.

Cloned tissue would be genetically identical to tissue your body produces through natural processes and could avoid many of the medical problems that arise from transplants. But an inchoate fear of "playing God" is leading the Washington establishment to hurriedly consider laws that could prevent such research from being done legally in this country.

The GAO report did not mention cloned tissues. But the Commerce Committee's February hearings included many representatives from the medical and biological research communities who urged Congress not to succumb to wild fears about cloning and ban potentially life-saving research.

Moving Marijuana

By Jacob Sullum

For decades the Drug Enforcement Administration has classified marijuana as a Schedule I drug—meaning, among other things, that it has "a high potential for abuse." The basis for that claim is the DEA's insistence

BRICKBATS

◆ The Illinois Department of Children and Family Services has doled out some $22.5 million to the most dysfunctional 1,370 families on its rolls since 1995. One mother of six got almost $75,000. Among the goods given to those parents, many of whom have been charged with neglecting or abusing their kids: electronic entertainment centers; YMCA memberships; and aikido, basketball, and drama classes. All this in an attempt to simulate middle-class environments for the children.

◆ Democrats will go to great lengths to get campaign dollars, but begging Newt Gingrich for money seems a bit desperate. Still, there it was, a solicitation letter to Gingrich from President Clinton on behalf of the Democratic Senatorial Campaign Committee. Said Gingrich spokesman Andrew Weinstein, "In an ongoing quest to shake down anyone with a wallet, the Clinton-Gore campaign has already worked its way through foreign nationals, Buddhist nuns, and impoverished tribes. I guess Republican leaders were next on their list."

◆ In South Carolina, the state board of education is considering putting less emphasis on IQ scores for admissions to gifted and talented programs. Instead, factors such as "motivation" would be considered.

◆ South Dakota voters this year will get a chance to vote on a new constitutional amendment banning nonfamily farm corporations.

—Charles Oliver

Henry Payne

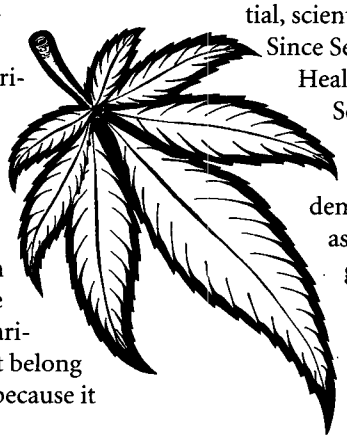
that *any* unapproved drug use constitutes abuse. Since Schedule I drugs are, by definition, not approved for any use, marijuana prohibition seems to be self-perpetuating.

But maybe not. In January the DEA revealed that it had asked the Department of Health and Human Services to evaluate a petition seeking the reclassification of marijuana, which would lift the blanket ban and make the drug available for research and medical use.

The petition (available at www.natlnorml.org/activist/gettman) was submitted in July 1995 by Jon Gettman, a former director of the National Organization for the Reform of Marijuana Laws, who is now a doctoral student in public policy at George Mason University. He argues that marijuana does not belong in Schedule I because it does not have "a high potential for abuse" under any reasonable interpretation of that phrase.

In a July 1995 letter to Gettman, DEA Deputy Administrator Stephen Greene said the agency would refer his petition to HHS if there seemed to be "sufficient grounds" and that the department's recommendation "shall be binding on DEA as to medical and scientific findings." After HHS completes its evaluation in a year or two, the DEA could propose a rule to change marijuana's legal status.

Gettman says he hopes HHS will conduct an impartial, scientific review. Since Secretary of Health and Human Services Donna Shalala has repeatedly condemned marijuana as "illegal, dangerous, unhealthy, and wrong," that is by no means assured.



May Day Payday

By Nick Gillespie

A century and a half ago, the original didactic duo, Karl Marx and Friedrich Engels, published *The Communist Manifesto*, which famously urged, "Workers of the world, unite!" While openly Marxist governments have been suffering through a bear market since the late 1980s, Marx himself is running with the bulls: *The New Yorker* recently anointed him not merely the most influential political philosopher of the past century but the "next most influential thinker" for the new millennium.

And on May 1—"May Day," the traditional labor holiday—Verso, the left-wing publishing house, will roll out a new, "upscale, sybarites' edition" of the *Manifesto*, featuring an introduction by historian Eric Hobsbawm. The first print run will be 20,000. And if this edition of the *Manifesto* ends up in the remainder bin of history, it won't be for lack of mar-

keting: *Publisher's Weekly* has reported that both Barnes & Noble and Borders bookstores are planning to showcase the book in "special promotions near the cash register."

Block That Web

By Jeff A. Taylor

Think Congress has given up slapping content restrictions on the Internet? Some legislators are attempting to slightly modify the Communications Decency Act, which was ruled unconstitutional by the U.S. Supreme Court last year. (See "CDA II," Citings, February.) And others think they have found a back-door route to content controls using schools and libraries.

In February, Sens. John McCain (R.-Ariz.) and Ernest Hollings (D-S.C.) introduced the Internet School Filtering Act. As a condition of a new federal handout, it would

require schools and libraries to use content-blocking software on computers that have access to the Internet.

The new handout is a special fund established by the 1996 Telecommunications Act that is intended to supply discounted Internet service to schools, libraries, and rural hospitals. The fund comes from surcharges on telephone lines collected by the phone companies.

As the surcharges pile up, the fund could total as much as $3 billion, although only $675 million will be available before July 1. The education lobby is eager to get its hands on the money and opposes anything which might slow that down, so it's not surprising that the American Library Association and the National Education Association have come out against the bill.

There are also concerns that the current generation of filtering software blocks too much. A recent study by the Electronic Privacy Information Center concluded that current filterware is "clumsy, ineffective and destructive of the Internet's educational potential." EPIC found that documents with such phrases as "National Aquarium," "American Red Cross," and "Thomas Edison" were routinely blocked.

Some dismiss the McCain-Hollings bill as an election year stunt which has little chance of passing. But don't be surprised to see the issue crop up as Congress rushes to adjourn and the bill is pitched in such a way that only pedophiles, child pornographers, and terrorists would oppose it.

SOUNDBITE

Time and a Half

In *Time for Life: The Surprising Ways Americans Use Their Time*, John P. Robinson, a sociologist at the University of Maryland, and Geoffrey Godbey, a professor of leisure studies at Penn State, debunk the popular belief that we have less free time than in the past. Relying on time diaries kept over the past several decades by tens of thousands of individuals, the authors detail just how we pass our days and argue persuasively that treatises such as *The Overworked American* and *The Second Shift*, both of which conclude that leisure time is dwindling, are seriously mistaken. REASON Senior Editor Nick Gillespie spoke with Geoffrey Godbey via phone in late February.

Q: What's most surprising about your findings?

A: Americans average about 40 hours of free time per week. That's a gain of almost one hour per day since 1965. This is time apart from work, meals, personal grooming, child care, sleep, etc. It's time spent on sports and recreation, with TV, radio, and movies, reading for pleasure, and hobbies. But when people are asked how much leisure time they have, their median estimate is about 16 hours a week. In fact, less than one out of five American has fewer than 20 hours of free time a week.

Another surprise has to do with what we call "more-more" behavior. For instance, people who have personal computers in their households don't read *fewer* books, magazines, or newspapers than people without PCs—they read *more*. The cliché that if you want something done, you should ask a busy person, has a great deal of truth to it.

Q: Why the increase in leisure time?

A: It's always misleading to focus on a single factor, but a lot of our technology has made us more [productive]. For instance, I just printed a book out on my laser printer this morning.

Q: If people really have more time, then why do they feel rushed?

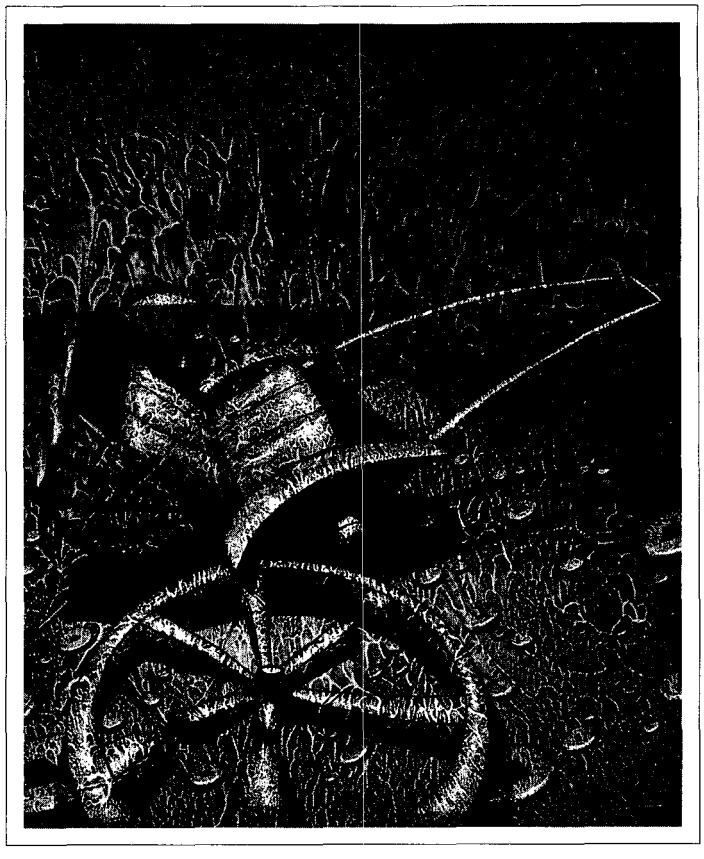
A: Twenty-five of those 40 hours come on weekdays, not on weekends, and they come in chunks of an hour here, an hour-and-a-half there. In many cases, that time does not provide for psychological release from work or other obligations. If leisure means *tranquility*, these hour-long chunks may not have much effect.

A major reason people feel rushed is that they believe the amount of change in our society is just unprecedented. More than anything else, rushing relates to the number of roles a person plays. If you're a married female with children in a two-car family and working full-time for pay, you'll feel rushed. Throw a pet in there, and you've got the whole catastrophe. Men's increased participation in child care and housework has a similar effect.

Is the Asian Flu Fatal?

Why Asia's economies got sick—and what can be done to cure them.

For most of the 1990s, East Asian economies were king, sucking up foreign capital and rewarding investors with handsome returns. Times change. The first signs of trouble came in spring 1997, when currency traders attacked the Thai baht. After belatedly attempting to reform its financial policies, Thailand abandoned its fixed exchange rate in June 1997, prompting the baht to plunge 20 percent. Other countries quickly followed. By November 1997, the International Monetary Fund had announced bailout packages for Thailand, Indonesia, and South Korea. Even the soundest and largest Asian economies were hit hard. Hong Kong, while repelling an attack on its currency, saw its stock market decline 40 percent in October. Japan, which had been deep in deflationary doldrums for the entire decade, saw its fourth-largest trading firm collapse under a pile of bad debt.



The sudden turn of fortune in Asia raises a host of questions: Why didn't anyone see this coming? What does this say about the Asian Way, and the Asian Miracle it supposedly produced? How should the IMF and the United States respond to the crisis?

While the first two questions make for interesting cocktail party chat, the last has been dominating discussion in Washington, where the Clinton administration is asking Congress to pony up $18 billion for the IMF's bailout fund. The debate over the IMF hinges on the relative harms posed to the international economy by "systemic risk" or "contagion" vs. the damage of "moral hazard." Proponents of the IMF argue that its virtue lies in the necessity of having an institution that can inoculate a region against "contagion" if a nation's economic system threatens collapse. As with the bank runs that took place in the United States during the Great Depression, if a country defaults on its commercial loans, investors may panic and pull their money from other countries in the region. Even though these national economies are fundamentally sound, this withdrawal causes a liquidity crisis as banks become unable to pay depositors; unless a third party such as the IMF steps up to provide needed cash ("liquidity"), the system can collapse.

Yet this risk must be weighed against the "moral hazard" the IMF creates. People who have insurance against broken legs, for instance, may be slightly more reckless skiers than those who have no health insurance and, in case of an accident, have to pay doctors' fees from their own pockets. In finance, investors will undertake more dicey investments if a portion of the real risk is insured by a third party which guarantees that it will repay investors, no matter how poorly they manage their money. By bailing out countries, the IMF

KRISTEN MELLON

encourages unwise risk taking.

REASON assembled a diverse group of experts to address these questions in mid-February at the American Enterprise Institute in Washington, D.C. James K. Glassman, a Reason Foundation trustee, American Enterprise Institute fellow, and *Washington Post* columnist, led the discussion. The other participants were Contributing Editor Brink Lindsey, who runs the Cato Institute's Center for Trade Policy Studies and spent seven years as an international trade attorney, representing clients throughout East Asia; Robert Litan, who directs the Economic Studies Program at the Brookings Institution, where he has most recently focused on financial regulation; Sebastian Mallaby, who covered Asian financial markets for *The Economist* from Japan and is now the magazine's Washington bureau chief; and Allan H. Meltzer, professor of political economy at Carnegie Mellon University, a visiting scholar at the American Enterprise Institute, and a leading critic of the IMF.

James K. Glassman: What is the problem in Asia and how did it come about?

Sebastian Mallaby: The problem in Asia is the collapse of a financial bubble rather similar to the one that we saw collapse in the early 1990s in Japan, where the financial community had got into its head that asset prices would go up only and not down. Property became massively overvalued. Bank lending, collateralized on their property prices, increased massively, to the point that when one of these asset markets went down, the whole packet collapsed.

Brink Lindsey: I see the Asian crisis here as the harmonic convergence of three sets of bad policies that have all come together and come to a head.

First, you have the bubble that Sebastian alluded to. That bubble is the effect of bad policies that led to a coddled, backward, and protected banking sector that was used as often as not as a slush fund for politically influential borrowers.

The second set is the mismatch between monetary policies and exchange rate policies. You had countries that were attempting to peg their exchange rates to the dollar, while at the same time attempting to run monetary policies that were in conflict with that peg. So you ended up with this big spread between domestic currency interest rates and foreign currency interest rates. Thailand, for instance, was paying rates of 14 percent or 15 percent, which were significantly higher than the U.S. prime. It created this suction effect, sucking in foreign capital. Banks could borrow in U.S. dollars and basically print money by turning around and lending that borrowed money at a markup.

The third set of policies is that for all of these Asian banks borrowing, you had U.S., European, Japanese banks lending recklessly because of the moral hazard created by the expectation that if things went sour, the IMF or some international body would bail them out of their troubles.

Glassman: Did the Asian model of command-and-control capitalism help precipitate this crisis?

Lindsey: The Asian miracle really happened. We had irrational exuberance about Asian values and the Asian system and that they could do no wrong, and that everyone over there was 10 feet tall and bulletproof. Now we have a sort of irrational panic that the whole thing was a fraud and it was all just crony capitalism and a completely corrupt system from top to bottom.

The bottom line is, South Korea went from $100 per person income in the early 1960s to European standards of living today. Even in this recent mess, they have gone from 24 times North Korea's GDP per head down to 23 times. So the progress they have made is stunning and enormous.

And I would argue that the progress is due to the extent to which the economies in East Asia followed a few simple pro-market rules. They had decent respect for property rights, they were oriented toward the global economy, and so forth.

But nonetheless, these countries all had serious structural problems. Most notably, while they developed wonderful manufacturing sectors, they have lousy, backward, primitive, uncompetitive financial sectors. Maybe short-term capital controls can mask those problems, but they can't make them go away. In the long term, if East Asia is going to continue on this miraculous growth path, they are going to have to clean house in the financial sector.

Glassman: But specifically how did that structure contribute to the current crisis?

Lindsey: The banks lent to a bunch of unworthy borrowers. They lent to build factories that weren't needed. They lent to build high-rises that were never going to be occupied. There was an enormous misallocation of capital.

Glassman: Directed by the government?

Lindsey: Sometimes, yes. In the case of South Korea, in the case of Indonesia, credit allocation was often a matter of national industrial policy. But even in other situations, in Thailand, also in Indonesia, you have enormous amounts of capital allocation going through banks as opposed to equity markets. You have these small clubby banks that are all run by ex-government ministers lending to cousins or pals of the people in power. You have an entire system of taking those wonderful Asian savings rates and pumping them out into the economy in a way that just ignores market criteria.

Mallaby: I could perhaps add a bit to that with the specific case of South Korea, which is what I know best. It's to say that it's not just the Asian model which is a problem here. It's actually the attempt to get away from that model which in some sense causes the crisis.

In the 1970s, Korea industrialized through a process of government-directed lending. At that time, the banks were told to lend to heavy industry. This industry grew massively fast, rather inefficiently because money was being pumped in without really paying attention to whether these projects were viable.

Then in 1979, when President Park Chung Hee was assassinated, a new team of top economists took over, which represented a shift from Japanese-trained economists who believed in the Asian model to MIT- and Harvard-trained economists who did not. This new team of Western-trained economists decided in 1980 to get away from state-directed lending. They said to these *chaebol* [large corporate conglomerates] and banks, "We're not going to direct your lending any more." These guys had spent 10 years being told, "We are directing your lending," and therefore by extension, "If it goes wrong, we will bail you out." So when the state direction was eased off a little bit, the *chaebol* and the banks invested crazily, all over the

place. They went totally nuts.

The government put on the controls again in the 1980s. Then there was a period of relaxation and massive expansion of investment because the controls had been taken off. Then the government put on the controls again.

This is why South Korea has followed a boom-bust cycle since 1980. What I think is interesting here is the attempt to unravel the Asian model because it was perceived as long ago as 17 years ago, 18 years ago, to be a mistake. It proved extremely difficult because every time you tried to loosen state controls, investment would balloon again. This is actually what is going on in this current crisis.

The *chaebol* were enjoying a period of relative liberalization in economic policy in the middle 1990s. Because of that, they were allowed to do massive investment and finance these investments by this great big borrowing, much of it in dollars.

When I was there, for example, in 1995, there were already too many car factories, but Samsung [one of the big *chaebol*] had just been given a permit to get into the car industry. And Samsung decided, "OK, we will build a lot of cars. We'll build a huge factory. We'll do all these other investments." Samsung's expansion plans proposed to add to South Korea's economy over the next few years the size of Sweden's whole GDP. That is what happens when you have got countries which are used to being directed by the government [that are] suddenly told, "OK, now you are free."

Allan H. Meltzer: I would simplify it down to three factors. The first was South Korea's size; it's the 11th largest economy in the world. In income it's the size of Los Angeles County. Now we would not think to have a banking system in Los Angeles County that was completely concentrated on Los Angeles County, because we would know that as soon as the entertainment industry went down, the banking system would go down. to come in underneath that. The semiconductor market collapsed. They ended up owning a lot of paper from the semiconductor industry.

That is why Korea was in trouble a year before the stock market there was going down, down, down. Korean companies had really made a lot of investments which proved to be bad. Those investment decisions were made by the government.

Glassman: So do you think governments have learned that they shouldn't pick the chemical industry or the semiconductor industry or tell the *chaebol* how much they should invest or the banks how much they should lend?

Meltzer: I will light a candle and hope for the best. But I don't believe it.

Mallaby: I will look at Japan and observe that it has taken them an awful long time to get anywhere toward liberalization. They have been trying for a long time.

Glassman: Why did everyone miss what was going on? It seems to me a stunning misjudgment by almost everyone in the world.

Robert Litan: That's a $64 billion question. There were a few people who were predicting a collapse or a major financial panic, although no one stuck their neck out saying when it would occur. The IMF at least is claiming that it was warning these countries privately but not publicly at least several months before the crisis. But this is a case where we have lots of irrational exuberance to go around. Alan Greenspan [who complained about "irrational exuberance" among investors in the U.S. stock market, analogizing to the Japanese bubble] probably had the term right but the region wrong. I think Brink and Sebastian are right, that there was irrational exuberance by banks, by investors, by governments—they thought 7 percent or 8 percent growth would continue and trees would grow to the sky uninterrupted.

Lindsey: I don't think that there was a wholesale failure to

Lindsey: The track record of IMF's conditionality is pretty miserable. The IMF is sort of like a substitute teacher. As soon as it leaves the room, the spit wads are flying and everything goes back to chaotic normal.

The second problem was that they compounded the problem by having, permitting, encouraging debt-to-equity ratios which were astronomical. There are companies there which have four times the amount of debt outstanding as they have equity, as compared to the heavily debt-burdened European companies, which have 80 percent, 80–20 split, or the United States, where it's about 15 percent.

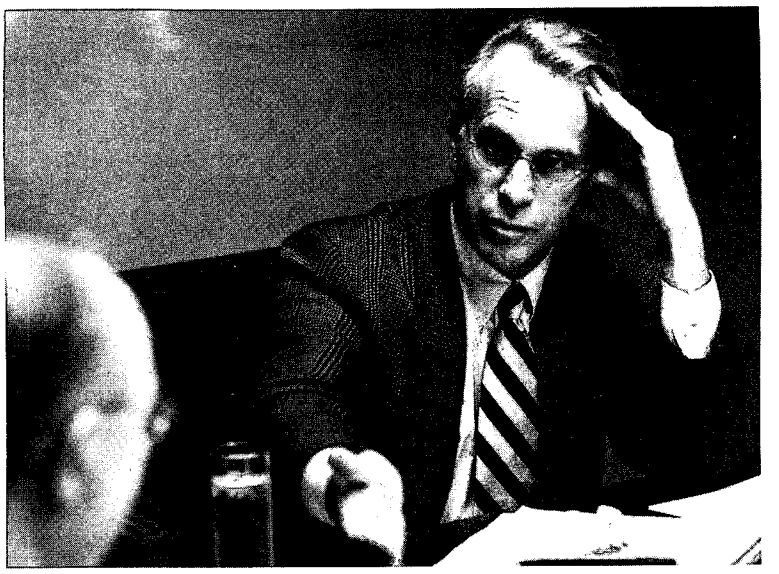
The third thing is one aspect of the Asian model. While I agree with much of what Sebastian just said, I disagree on two points. One is that in the 1980s Korea picked the chemical industry, and it put a lot of money into the chemical industry. It turned out to be a bad investment. Most of the banks were left holding a lot of worthless paper.

In the late 1980s and the early 1990s, it was the semiconductor industry. Now part of that was a response to the U.S.-Japanese semiconductor agreement, which set a minimum price on semiconductors in the U.S. market for Japan. The Koreans decided see these problems. Anybody who is familiar with these economies knew they had rotten financial sectors, knew that there was endemic corruption, knew that there was a lot of crony capitalism, knew that the exchange rate pegs and macroeconomic fundamentals were in conflict. Yet you get lulled into 8 percent growth year after year after year. You start thinking, "Well, these problems exist but the virtues of these places seem to outweigh the problems." I think the moral hazard element tends to increase that lulling effect.

Litan: I was going to add one more thing that I think everyone missed: the suddenness and the severity of the problem once it became manifested. We had a classic case of contagion here, where even countries with strong fundamentals like Singapore and Taiwan, both countries with lots of reserves in the bank, got hit by the flu.

Meltzer: But that didn't last more than a few hours or days. Right?

James K. Glassman: I don't know what the bankruptcy laws are in Mexico, but I think they are probably better than they were in Asia. I thought the whole point of what the IMF was doing was to use the money as kind of a carrot, a lure to get them to accept these kinds of changes. You can tell [Indonesian President] Suharto, "We'll give you $20 billion, but you need new bankruptcy laws."



PHOTOS: CHAS GEER

Litan: Their currencies still are lower than where they were before the crisis.

Meltzer: Ten percent, something of that order?

Litan: Ten percent is not chicken feed.

Meltzer: No, no. But the market quickly did discriminate between those who were in trouble and those who were not. One of the things that has been left out here is the revaluation of the dollar. These countries peg [their currencies] to the dollar. They got the benefit of lower prices in Japan as a result of being pegged to the dollar. Then when the dollar revalued and the Chinese had devalued, they were in a less competitive position.

So I don't think that their problems were unforeseen. As a matter of fact, lenders began to demand guarantees from the state long before the crisis actually broke out in the form in which we know it in the fall.

Glassman: You say that lenders demanded guarantees from the state. These were not explicit. What makes this different from what happened in Latin America in the 1980s is most of these loans were to private corporations or banks.

Meltzer: That's right. But they said, "We won't renew our loan unless you give us a guarantee on some of the private debt." In the case of Korea, the government offered the guarantee on the private debt in order to keep the money from turning over.

Glassman: Capital was flowing into these countries before there were any kinds of guarantees by the governments themselves.

Meltzer: Yes. The reason for that is moral hazard. The banks didn't believe, as far as I can see, that they were going to ever lose. So they didn't ask for balance sheets, they didn't ask how much was outstanding in loans. They didn't worry about the fact that there was exchange risk that they would take. And the reason they didn't do that is because they were expected not to pay for any defaults.

Glassman: So it was clear to investors that if things went bad with their loans to Korean banks, the Korean government would step up. Then behind the Korean government is somebody else [the IMF]. Do you agree with that, Sebastian?

Mallaby: First of all, it wasn't entirely clear that the IMF would step up. When the crisis did hit, there was a lot of controversy, there was a lot of uncertainty about what would happen.

I lived in Tokyo and I went to Korea a lot between 1992 and the end of 1995. I covered finance and I talked to bankers all the time. None of them ever told me, "This lending is fine because the IMF is going to pay this out." They told me, "This is fine because these economies are very strong and they are growing very fast, and they can generate enough profits to service these debts."

Lindsey: I am sure that you would be hard pressed to find investors that were saying, "OK, I have got nothing but upside here, and if these loans all go south, then the IMF is going to bail me out." However, it's hard to argue that you wouldn't have seen dramatically different behavior if all of the European and U.S. banks that are currently exposed had gotten burned in Mexico and hadn't gotten bailed out. If they had to pay up a few years ago, it's hard to imagine they wouldn't have been more cautious and more discriminating in how they diversified their portfolios in Asia.

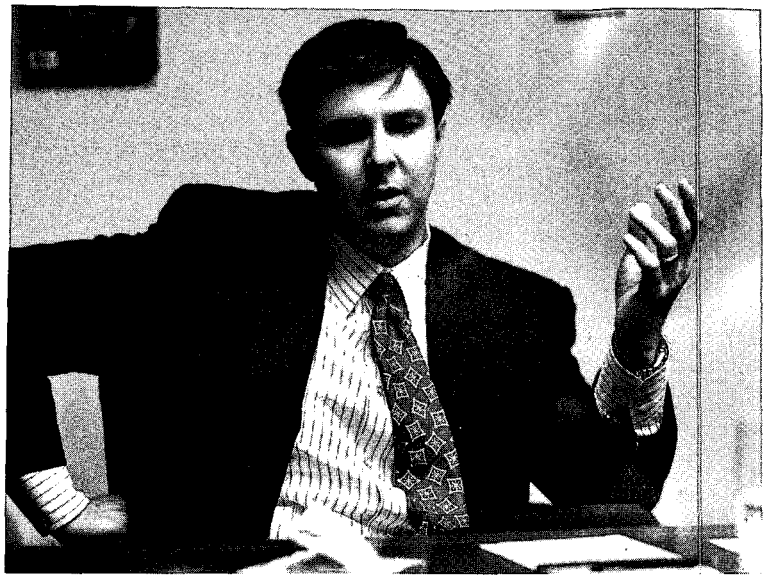
Meltzer: I'm with Brink. How can you explain why people didn't look at a spread between 15 percent and 20 percent interest rates and 4 or 5 or 6 percent interest rates and ask themselves why that spread is there? And how can you explain sophisticated lenders letting people borrow without showing the total amount of their debt and assets outstanding? These banks were lending without even asking for balance sheets.

Litan: I am sort of in between, not an uncommon position for Brookings. After Mexico in 1995, these Asian economies were growing at 6 to 8 percent. Even if the IMF had not come to the rescue in Mexico, a lot of banks would have behaved exactly the way that Sebastian talked about. These are rapidly growing economies.

Back in 1995, people weren't asking questions about these countries. By 1997, I would say all the warning signs were there. But certainly in 1995 and 1996, I would expect the money to have poured in.

Glassman: Mexico is cited by both sides in this debate. How do you characterize what happened in Mexico?

Meltzer: It was a success for the bankers. The bankers claim



Brink Lindsey: The Asian miracle really happened. South Korea went from $100 per person income in the early 1960s to European standards of living today. So the progress they have made is stunning and enormous. And I would argue that the progress is due to the extent to which the economies in East Asia followed a few simple pro-market rules.

it as a success. The IMF claims it as a success. The U.S. Treasury claims it as a success. The success was that the Mexicans paid back the loan by borrowing money in the private market at higher interest rates.

From the standpoint of the Mexican people and the Mexican economy, it was a disaster. In the years since the 1970s with all the difficulties that Mexico has had, debt has gone up something like a factor of four in real terms. Real income in dollars is the same as it was in 1974.

This is a country which has really been through the wringer during a period of very high growth and is now saddled with the problem of having to pay back or at least service a very much larger real debt. Instead of being able to use its revenues for the future growth of Mexico, it is going to have to use a lot of those revenues just to service its debt.

So I would say the Mexican situation is bad. If I judge where it is at the moment, it's on the verge of another inflation.

Glassman: So let me give you an analogy. A family owns a house, bought it for $100,000 and has an 8 percent mortgage, and then suddenly they can't make the mortgage payments. Another friendly banker comes in and says, "I'll take care of the mortgage payments for you," but at 12 percent.

Meltzer: And at four times the mortgage. So we're not only going to give them more debt, more of their income is going to go to service that debt.

Glassman: On the other hand, we avoided what Treasury Secretary Robert Rubin and a lot of other people were saying was an imminent meltdown.

Litan: Well, there were contagion effects in Mexico. I agree with everything that Allan said. Mexico is certainly not in great shape. The question to ask is how much worse shape would it have been in if there had been no rescue at all. And that's the relevant question to ask for all the Asian economies.

In all these countries, the common element is they suffer loss of confidence, and their foreign exchange reserves are disappearing rapidly. The IMF comes along and says, "We're willing to lend you some foreign exchange reserves in return for a price." Then they impose all these conditions.

The conditions impose lots of pain. But the question is, when you are running out of foreign exchange and nobody has any confidence, are you better off to essentially let the market do its work and let the economy grind to a halt, with no trade, no foreign exchange? Or do you give it lender-of-last-resort assistance? My view of why the IMF exists is to be the international lender of last resort.

Glassman: So for you, Mexico was a success?

Litan: It was a qualified success. I say it was a success in the sense that Allan talks about. The loan was paid back. I think we avoided a larger contagion.

Mallaby: I agree with Allan, which is one of the reasons why I think that the moral hazard argument has to be stated very carefully. If you are saying correctly that Mexico has gone through a tremendous amount of pain since then, it's hard to argue that countries in Asia would have looked to the Mexican experience and said, "That's fine, the IMF bailed them out. We'll do this too."

The fact is that from the country point of view and from the household point of view, there is massive pain. The moral hazard argument applies specifically and only to the lenders.

Glassman: You didn't give me a final judgment on the Mexican bailout.

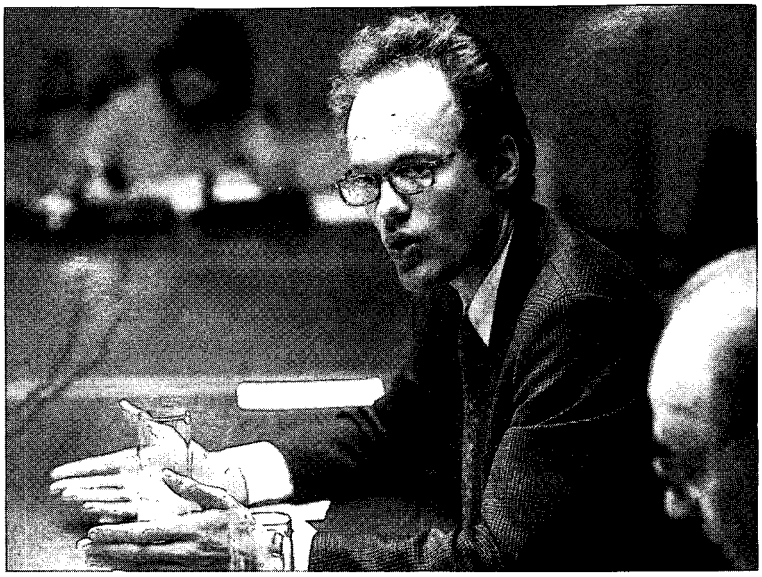
Mallaby: I think it's good.

Glassman: Brink?

Lindsey: Bob said that the Mexican bailout helped to quell or at least minimize a contagion effect. But in so doing I believe it provoked another one. Not only are the Mexicans worse off because of the Mexican bailout, but so are the Thais, the Indonesians, and the Koreans, because the message sent by the IMF after the Mexican crisis is a large contributor to the mess we have right now.

If there had been no bailout, you would have had loan workouts. The bankers who had lent to Mexico would have had to write off part of their debts. Mexico would have been relieved of part of its debt burden. Instead, it's now facing a greater debt burden than ever. Furthermore, you sent the signal that it's privatization of upside and socialization of downside the next

Sebastian Mallaby: We would love for there to be a great bankruptcy law in Korea and Indonesia, but there pretty much isn't any law in Indonesia. Since we're dealing with countries with a lack of the kind of transparency and rule of law and orderly mechanisms that we would all wish for, what do we do in the interim? Do we risk systemic collapse?



go-round.

Meltzer: The alternative [in Mexico] was default. We do that all the time through the Paris Club [an international lending body that helps developing countries restructure debt] and other institutions. I can see no reason why that wouldn't have been a better solution for Mexico. They would have ended up with a debt that was much less burdensome to the economy. They would have ended up with at least as good an economic performance. Because as soon as the defaults were renegotiated, the economy would start to pick up.

Glassman: Do you agree with Allan, Sebastian, that you could have just defaulted, the bankers would have worked it out with the debtors, and they would have solved their own problem without any help from the United States or the IMF other than maybe some advice?

Mallaby: It is possible. But is the possibility high enough that if you were running U.S. policy or IMF policy, you would risk systemic contagion and domino defaults in the rest of Latin America or elsewhere? I think the people who were actually sitting in the Treasury and the IMF think 50–50: "If we do nothing, the chance it works out is 50 percent; but the chance there will be systemic defaults all over the region and there will be complete chaos is also 50 percent. I'm not going to take the risk."

Meltzer: But the role of people inside government is also to say, "It isn't my money. [Chaos is] not going to happen on my watch. Therefore, I am not going to let it happen on my watch. Why should I take the risk that my watch will be seen to have failed when in fact by using public money I can make sure that that doesn't happen?" That is really where the moral hazard arises.

Mallaby: There is a sort of bias towards eliminating immediate risk on your watch at the potential expense of creating the risk that other such crises are more likely to emerge because you have sent a signal to the international financial system that you will bail them out. But Allan, if you were sitting in [Treasury Secretary] Bob Rubin's chair, what would your view be?

Meltzer: If I was sitting there, I would be tempted to do exactly what he does. That is why we need to change the system. The system we need is one where the IMF is a lender of last resort. What we now have is a lender of first resort. We have someone who says, "I am going to lend to them at low interest rates in order to prevent the crisis," instead of saying what a true lender of last resort says: "I will lend on good collateral at a penalty rate."

Litan: We faced this problem in the United States after our banking and savings and loan problem, and adopted in 1991 a law that said that uninsured large depositors can no longer be bailed out unless the Treasury, the Fed, and the FDIC all agree that they should. We need something like that internationally.

The problem in Asia is they have little or no bankruptcy laws. A clear policy goal is to get bankruptcy legislation in these countries and credible mechanisms that work. And we have to find a way to make banks automatically either take a haircut or have their debt converted into equity when some kind of certifiable crisis arises.

Glassman: I don't know what the bankruptcy laws are in Mexico, but I think they are probably better than they were in Asia. Certainly the debt-converted-to-equity possibilities are probably better in Mexico than they are right now in Asia, where it's pretty hard for any American company to own anything in Korea. Would the nonbailout have been a solution in Mexico?

Litan: I don't think we had in 1994–1995 the equivalent of a bankruptcy court. I think there is an uncertainty about the process that scares investors. The sooner we can get certainty of some kind of mechanism the easier it becomes to take the gamble that Allan recommends. The whole game is about making this credible.

Mallaby: We have to be a bit real-worldish. We would love for there to be a great bankruptcy law in Korea and Indonesia, but there pretty much isn't any law in Indonesia, let alone bankruptcy law. Since we're dealing with countries with a lack of the kind of transparency and rule of law and orderly mechanisms that we would all wish for, what do we do in the interim? Do we risk systemic collapse?

Glassman: I thought the whole point of what the IMF was doing was to use the money as kind of a carrot, a lure to get them

to accept these kinds of changes. You can tell [Indonesian President] Suharto, "We'll give you $20 billion, but you need new bankruptcy laws." He says no. Then what is the next move?

Lindsey: The track record of IMF's conditionality is pretty miserable. The IMF is sort of like a substitute teacher. As soon as it leaves the room, the spit wads are flying and everything goes back to chaotic normal.

Clearly these countries would all be better off if they had decent bankruptcy codes. My understanding is that in Taiwan bankruptcy is much more common. Perhaps that's why they have avoided some of the structural problems that some of the other economies in Asia are now suffering from.

But the issue here is between the foreign lending banks and the Asian borrowing banks. I don't see why in the absence of domestic bankruptcy codes, those banks couldn't work out negotiations where the foreign banks agree to come up with some realistic payback amount and payout period, and lump it for the rest.

Mallaby: I think we are going to see that.

Glassman: Let's say the IMF just disappeared. There was no IMF solution in Asia. What would happen?

Meltzer: There would be defaults. They would have to renegotiate the debt. Indonesia is already in default. There would be more of them.

Glassman: Would lives of the people who live in Indonesia be worse, or better? Would the Indonesian economy in the short term be worse or better?

Meltzer: The short-term effect would be small in either direction. Once the loans are renegotiated, then the people would be better off because they would be able to grow again without the problems of increased debt.

Glassman: Do you think there is systemic risk?

Meltzer: There is a systemic risk. It comes from the fact that we have a large amount of borrowing in foreign currencies, so that if we have a sudden withdrawal of those foreign currencies, there can be disruption in the system. The question is, Can we find a way to reduce that risk without at the same time imposing moral hazard? The proposals I made earlier are steps in that direction.

Glassman: Just to be clear, systemic risk comes from what, rolling default?

Meltzer: There are a lot of renewable 90-day loans. When you learn that his bank or your bank has decided not to renew its loan, and another bank has decided not to renew its loan, then you say there may be a crisis. I won't renew my loan because things are not likely to get much safer and they might get a lot worse. So we get a whole lot of these loans withdrawn at the same time. That pushes the country into a liquidity crisis.

Korea had a whole lot of loans coming due in the first quarter. If it had gotten through the first quarter, it had no other government loans to banks and [foreign] governments coming due for the rest of the year—it had private loans coming due—and it would have gotten through the crisis. But they all got called at the same time, and that produces a crisis. There is a systemic risk there that we may be able to reduce and perhaps eliminate.

Glassman: Let me ask Brink if he would accept an IMF under those conditions.

Lindsey: I think we would be living in a much better world if we had that kind of international lender of last resort. I think it is certainly possible that global banks could band together and in their common interest set up institutions that would mimic precisely this kind of governmental body. But certainly this kind of governmental body would be a lot better than what we have now.

Litan: If we were to abolish the IMF tomorrow, the U.S. Treasury would become the IMF or would be tempted to become it. There would be tremendous pressure on the United States to do it, at least for the large countries, the ones that are our friends.

Is the United States going to sit by with all these troops in Korea, and let Korea go down the tubes without an IMF? It is not going to do that. We are better off having the IMF do this than having the U.S. Treasury do it.

Mallaby: I think everything Bob said is exactly right. The Treasury would do it, and that would be much worse.

For most economic sectors there isn't an IMF. There is no IMF to bail out car companies around the world. There is no IMF to come in and fix a retailing sector if your [Main] Street closes down. There is an IMF for the financial sector because the financial sector is special.

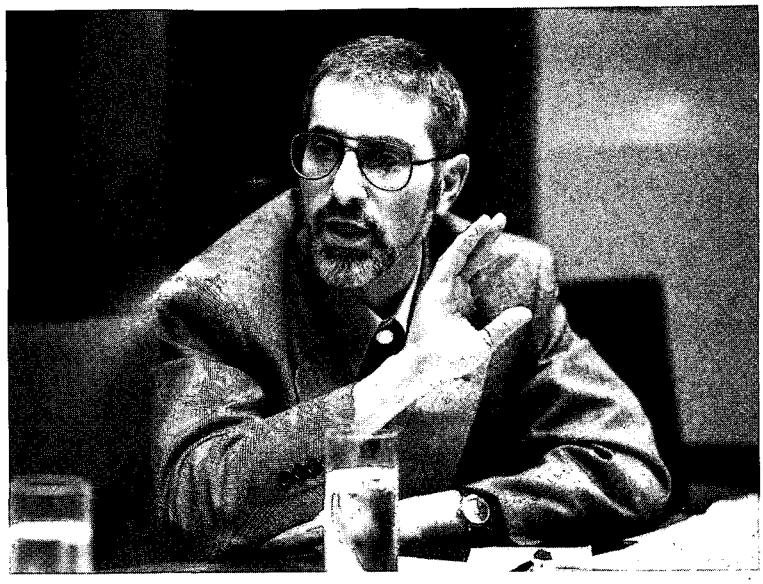
You can believe in free markets, as we do at *The Economist*, but you have to concede that there is something special about financial markets. If you allow one country in Southeast Asia to go down, and that country owes money to a neighbor, the neighbor will suddenly find it won't be repaid that cash and it will go down too. You will have a crisis. [It] is not fundamentally a solvency crisis, as I think as Brink was saying earlier; we would still be fundamentally bullish about East Asia. I mean, these are economies which will probably recover from this and do pretty well. You don't have a solvency crisis, but you do have a liquidity one. That is where the IMF has a short-term role in just stabilizing things.

Meltzer: The banks didn't believe that they were going to ever lose. So they didn't ask for balance sheets, they didn't ask how much was outstanding in loans. And the reason they didn't do that is because they were expected not to pay for any defaults.

Let's take a different kind of risk contagion argument. Not from one country to another country, but [from] one area of the country to another. I am thinking of the contagion from the financial trouble to social unrest to political instability, then possibly to war.

In South Korea, nationalism is so acute that when a Korean woman dates an American diplomat for a year, a serious relationship where they are thinking about getting married, this girl gets locked up in her room by her family and told that if she

Robert Litan: There is going to be a lot more unemployment in these countries. There already is a growing backlash against the West. These countries don't have unemployment insurance mechanisms. You could have political instability in these countries which could move you away from markets toward more state control, toward more closed societies.



carries on with this American she's disgracing herself and she is disgracing all her siblings, who will never be able to marry anybody. We are talking about serious nationalism.

So let us suppose because of this nationalism that South Korea refuses to allow foreign banks to come and buy Korean banks. Under your rules, we would cut off all IMF assistance to this country. Since the Korean economy is interlaid with the *chaebol,* which dominate large chunks of GDP, you could get a massive bankruptcy because of a liquidity crisis, which would cause big social unrest. And you have got U.S. troops [in your territory] and a [neighboring] communist country with lots of soldiers on the border. Do you really want to risk that?

Meltzer: Yes. That's the only way you are going to get reform. You have to set up some rules. You tell people what the rules are. You enforce those rules.

Lindsey: I think it's pretty obvious that the Koreans do a fine job of overcoming their xenophobia when the alternative is meltdown.

Glassman: So Allan has given us his remedy for Asia. What is yours, Bob?

Litan: It's very similar. I think the IMF already has been pressing these countries to open up their banking systems. Allan wants to make a hard and fast rule from now on: You have got to be open to get the assistance.

The penalty rate I agree with. And inside the countries themselves, we shouldn't be waiting for the next crisis. I still think we ought to be pushing hard to have workable bankruptcy mechanisms in these countries and some kind of automatic haircut rules of the kind I mentioned.

And I think there is a role for judicious limitation by the countries themselves of excessive foreign borrowing, short-term borrowing. I think these countries clearly went overboard borrowing short term.

Glassman: Could this have a happy ending?

Litan: Certainly it could. Is there a chance for a bad outcome? Certainly there is.

We have not seen the end here. There is going to be a lot more unemployment in these countries. There already is a growing backlash against the West. These countries don't have unemployment insurance mechanisms. Korea is now working on one, but the other countries aren't. They didn't have these safety nets precisely because growth was bailing them out for 25 years. Now all of a sudden they don't have [it]. You could have political instability in these countries which could move you away from markets toward more state control, toward more closed societies.

Lindsey: Allow me to be cautiously optimistic. I don't think Japanese foot-dragging is necessarily a model for the rest of the countries in this region. Japan suffers from the advantage of having enormous domestic resources which allow it to avoid facing up to its own internal problems. These other countries don't, and perhaps they will do the right thing of having intense short-term pain in exchange for a longer-term gain.

I think it is quite likely that over the medium-to-long term, you are going to have significantly greater foreign presence of banks in these economies, and you are going to have significant financial liberalization so that equity markets in these economies are not so suppressed. You are going to see a lot more foreign players involved.

It's quite hopeful and even a little bit astonishing that all of these countries signed on to the World Trade Organization Financial Services Agreement last December. Ten or 15 years ago, the idea that any developing countries would allow foreign banks to come in even to a limited extent was unthinkable.

Litan: I agree with that 100 percent.

Glassman: And you think that that was the result in part of the problems that they are having now?

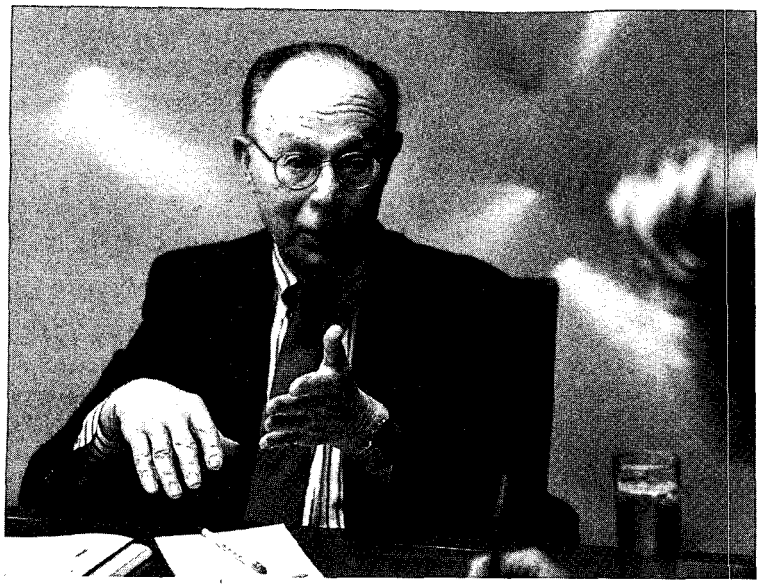
Lindsey: I think that certainly goosed things along.

Meltzer: Whether they'll let them operate there in a competitive way remains to be seen.

Glassman: Just quickly, what did this agreement say?

Lindsey: In general it's going to allow much greater competition in financial services, allow foreign banks and foreign financial institutions to set up shop and compete in the domestic markets of countries around the world.

Glassman: Japan has been in the doldrums now for eight



Allan H. Meltzer: The role of people inside government is also to say, "It isn't my money. [Chaos is] not going to happen on my watch. Therefore, I am not going to let it happen on my watch. Why should I take the risk that my watch will be seen to have failed when in fact by using public money I can make sure that that doesn't happen?" That is really where the moral hazard arises.

years. If Japan could wake up its economy, then maybe these Asian problems would be solved very quickly. Is that an accurate characterization?

Mallaby: It's true that if Japan was booming right now, it could suck in Asian imports. That would help the Asians and [provide] the foreign currency they need to service their debts.

It is also true that if Japan was booming right now, it would be perhaps exporting a lot of capital through its banking system and other mechanisms into Asia. A nice flood of yen into the region would be wonderful because that would also buoy East Asian currencies and ease their debt service burden.

The problem is that Japan has moved during the 1990s from a position where it ran budget surpluses to a position where by some measures Japan's budget deficit is at 5.4 percent of GDP, which is the biggest of any of the G7 countries.

There isn't really much room in Japan for a big fiscal boost. The Japanese are just talking about a ¥1 trillion supplementary spending package. If you compare that to 1995, when they did two packages which collectively were worth more than ¥20 trillion, you see the scale of the problem. They have just spent so much money recently that they can't do much more about it. And they have a demographic crunch coming which makes America's entitlement problem look like a picnic.

Glassman: What about a monetary boost, Allan?

Meltzer: There are three reasons why a monetary boost would be very good. One is you want to get asset prices rising. If you have asset prices rising, then the banking problem would look considerably smaller. The third thing would be [that] you would create some domestic demand.

Litan: I'm not sure I agree. Look, I don't disagree with the need for stimulus. But if I had to choose between the two, I would step on the fiscal pedal before I stepped on the monetary pedal, because a more expansionary monetary policy will lead to a lower value of the yen, which would provoke cries in the United States that Japan was trying to export their way out of their mess.

I would put more into the fiscal gas. They made a severe mistake by having that tax increase. At a minimum, they ought to get rid of that. They ought to, in my opinion, have more short-term fiscal stimulus.

Meltzer: But these are not alternatives. They could do both.

Litan: Agreed. Doing both would keep interest rates from falling and thus depreciating the yen. Then the third thing of course is their banking mess, which we haven't talked about.

Glassman: What is the solution there?

Litan: Well, there are two basic models. One is the Resolution Trust Corporation model. At least for banks, an RTC mechanism would throw all the bad assets into essentially one liquidation outfit and sell off the healthy parts of banks, which are the deposits and the few good assets that they have.

Our banks and other foreign banks would be interested in buying "clean" institutions. But these dirty institutions full of bad debt and God knows what else...it's not clear if anybody would want them.

The alternative is the Reconstruction Finance Corporation model, which we used in the Depression. Under this approach, the Japanese government would invest a bunch of money in banks in order to prop up their capital.

The reason the Japanese have so far chosen the RFC model is that if they decided to take the good bank/bad bank approach, as a practical matter there are very few people or institutions in Japan that are healthy enough to buy the unhealthy stuff.

So as a practical matter, you would directly lead into Allan's favored solution, which I agree with in an ideal world. The only buyers would be foreign. You would have German and American and Swiss banks buying up all the Japanese banks. It would be great. As an economist's dream, that's exactly what should happen. They should follow this model. Politically, getting that to happen in Japan is exceedingly difficult, to put it mildly.

Meltzer: To put it mildly.

Litan: So that is why they chose the RFC model of injecting government money.

Now as a second-best alternative, I would still take the RFC model, which is what they are doing, compared to doing nothing at all.

Glassman: And meanwhile the problem with the banks, just

so everyone understands, is that they have all these bad loans, gigantic amounts of bad loans which they can't recognize. Correct? Otherwise the banks would be technically insolvent?

Meltzer: And the order of magnitude of that problem is probably in current dollars more than twice the size of the savings and loan problem here at its worst. It affects the whole banking system.

But that problem would be smaller if we had asset prices rising instead of falling. We shouldn't overlook the fact that as long as asset prices are falling or not rising, people say there is no rush to buy any real property because tomorrow it will be cheaper, and nothing much is going to happen to change that.

Litan: I'm just going to make two quick points. One is that in the fourth quarter of 1997, the official total of problem loans in Japan was about $170 billion. Privately, the analysts will tell you the number is anywhere from three to four times that. So let's say in round numbers Japan's banks have $700 billion of problem debt.

In the United States, if you add up all the bank loans to American business—commercial and industrial loans—it's roughly $700 billion. So basically they have the equivalent of our entire commercial and industrial sector [in] bad debt.

The other beauty about an RTC solution, if you could ever do it, is that an RTC in Japan would end up inheriting at least a trillion dollars of real estate assets, which it would then sell. There have been virtually no sales of real estate in Japan for decades. You could open up the real estate market in a tremendous way, not only to foreigners, but to Japanese. Real estate doesn't move in Japan now because there are heavy taxes on the transfer. The government could sell all this real estate without the tax penalty, and could basically reshuffle the deck. It would be a dream come true, but I don't think we'll see it.

Meltzer: When we started to estimate what our savings and loan problem was, we got numbers like $300 billion. When we actually realized it, because we got asset prices to rise, it turned out only to be $150 billion.

Glassman: What kind of political problems here in the United States are going to be caused by Asia exporting its way out of this mess? We have already seen a group in Congress that's defeated fast track [approval for trade agreements], and that protectionist wing seems to be growing.

Lindsey: I think there is going to be a lot of hand wringing and name calling as the trade deficit rises. But I really don't expect to see any serious policy reversals here in the United States, any serious reversions to protectionism on account of this.

Compared to the 1980s, where you had rising trade deficits and rising protectionist pressures, there are two big differences. One, U.S. industries have already been through 10 or 15 years of grueling restructuring. They are just much better poised to face the competitive challenge that's raised by this shift in exchange rates.

Two, because of the Uruguay Round agreements and the establishment of the WTO, we have institutional checks on protectionism that we didn't have in the 1980s. The two popular ways to act out in the 1980s in the face of protectionist pressures were to enter into voluntary restraint agreements or quota agreements with exporting countries and to launch these Section 301 cases, where we threaten to impose unilateral sanctions [against] countries that don't go our way.

But VRAs and Section 301 sanctions are now GATT-illegal, and we have a dispute settlement mechanism that will say so. Although people will fuss and fume about the WTO, we are not going to pull out of it. Those constraints are going to help to keep the protectionists in line this time around.

Mallaby: I think it's basically right that there won't be a shift back towards protectionism. But there might be a different kind of shift, a bigger, more macro kind of shift as a result of this East Asian crisis, which I think will be extremely healthy. There might be more attention directed toward what it is that the Americans in a post–Cold War world really want from the rest of it.

There was a period right after the collapse of the Berlin Wall, and again I suppose with the bursting of the Japanese bubble, when you could characterize a lot of American sentiment towards the outside world as *Schadenfreude.* We used to be rivaled, and now we're rivaled neither militarily nor economically.

Glassman: You mean joy at someone else's unhappiness.

Mallaby: Yes. Now I would say that there's a new thing. It's not *Schadenfreude,* it's *Schadenangst. Schadenangst* is fear at the trouble of your neighbors and rivals. It's become apparent, for example, that a collapsed Soviet Union and a weak Russia can be rather worrying. It can mean loose nukes, it can mean rising nationalist tension, it can mean all sorts of problems about NATO expansion. It can mean lack of cooperation on Bosnia or Iraq or whatever. It's not necessarily a great thing. You want stability in your rival powers.

Mallaby: If Japan was booming right now, it would be perhaps exporting a lot of capital into Asia. A nice flood of yen into the region would be wonderful because that would also buoy East Asian currencies and ease their debt service burden.

The same is true of East Asia. It used to be thought, for example, that the trouble in Japan was a great thing because at last America could reassert economic preeminence. Actually, it turns out that we wish Japan were stronger because then they would be able to help more on the fiscal policy front, absorbing East Asian imports. They would be able to help more with capital flows, boosting Asian currencies by exporting capital into these East Asian economies. They would be able to do more on the monetary side as well. It would be wonderful if Japan were strong again.

I think that America is seeing the need not merely to be the dominant power in a unipolar world, but to be the dominant power with usefully strong allies. This is an important shift, to use another German phrase, in *Weltanschauung,* or worldview.

Rebel Rousers

Why right- and left-wingers both hate advertising

By Nick Gillespie

If legislative politics makes for strange bedfellows, then cultural politics makes for the sort of interspecies couplings that warranted the death penalty in colonial America. Consider the recent convergence between right-wing and left-wing critics regarding motifs in popular culture in general and advertising in particular. For different—though ultimately

HENRY PAYNE

related—reasons, both the right and the left decry the ubiquity of products and images tied to "rule breaking," "cultural rebels," and "revolution."

This surprising meeting of minds is on display in *The Weekly Standard*'s January 19, just-short-of-a-rave review of *The Conquest of Cool: Business Culture, Counterculture, and the Rise of Hip Consumerism,* by Thomas Frank. As a contributor to *The Nation* and *In These Times,* Frank is not the sort of guy conservatives usually bring home to mother. Indeed, given his role as editor of *The Baffler,* a magazine of leftoid cultural criticism that prefaced a recent issue bemoaning the decline of unions with a long quote from John Reed, one expects Frank to be on the other side of the battlefield from most conservatives, not cozying up in the same foxhole.

And yet there's *The Weekly Standard,* bankrolled by Rupert Murdoch, a Lex Luthor–level supervillain in *The Baffler*'s universe, cooing, "Frank has produced a refreshingly spirited book" and lamenting in solidarity with its crossover comrade that "too many Americans now appear too willing to believe that deep human needs can be satisfied through the constant accumulation of new-but-disposable goods: cars, computers, soft drinks, sports shoes—everything from razor blades to pork rinds—that are perpetually pitched as daring, vaguely dangerous, *cool.*"

William Bennett and Thomas Frank are upset for very different reasons. Bennett fears that people will follow mass directives toward rule breaking and unrestraint and actually stop being diligent and hard-working. Frank is concerned that radical social change—the sort in which workers of the world unite—is being stymied by commercial appeals to faux-rebellion.

For conservatives, much of the appeal of critiques of "consumerism" is the focus on how advertising exhorts people to libertinism and impulsive behavior, to live for the moment rather than the long haul. *The Conquest of Cool* is steeped in such an analysis and throws in an added bonus for right-wingers: a critique of the '60s counterculture. Frank's book is a study of how during that decade corporate America co-opted, helped create, and perpetuated popular countercultural motifs of youthful defiance, particularly in the advertising and men's clothing industries. Drawing on the work of social historians such as Warren Susman, William Leach, and Jackson Lears, Frank details the evolution of '60s-era ad campaigns such as Columbia Records' "The Man Can't Bust Our Music," Oldsmobile's "Youngmobiles," and 7Up's "Un-Cola" pitch.

Such ads, says Frank, are the forebears of today's omnipresent images of "cultural rebels": "Commercial fantasies of rebellion, liberation, and outright 'revolution' against the stultifying demands of mass society are commonplace almost to the point of invisibility in advertising, movies, and television programming," writes Frank. "Nike shoes are sold by... William S. Burroughs, Iggy Pop, and Gil Scott-Heron...the products of Apple, IBM, and Microsoft are touted as devices of liberation...our televisual marketplace is a 24-hour carnival, a showplace of transgression and inversion of values, of humiliated patriarchs and shocked puritans, of screaming guitars and concupiscent youth."

Like most conservatives who watch TV, surf the Web, or walk into a record shop, Frank is profoundly dispirited by what he sees: "However we may rankle under the bureaucratized monotony of our productive lives, in our consuming lives we are no longer merely affluent, we are *rebels.* Efficiency may remain the values of daytime, but by night we rejoin the nonstop carnival of our consuming lives. As it turned out, the mass society critique was one with which American capitalism was singularly well prepared to deal—which is why it sometimes seems we will never be rid of it."

Of course, that a leftist would gnash his teeth over the seeming triumph of "American capitalism" is hardly surprising. What is interesting is how closely such a formulation meshes with contemporary right-wing takes on the same topic. Consider, for example, William J. Bennett's article about "rock-&-roll and the collapse of authority," which appeared last year in *The American Enterprise.* It pondered "what hath the Beatles wrought?" A confessed "lover of early rock-and-roll music," the former drug czar reluctantly concedes that, yes, there might "be something intrinsic in the rock ethic that quickly leads down the slippery slope from liberty to libertinism." In suggesting this, he follows a trail blazed by Allan Bloom, who speculated a decade ago in *The Closing of the American Mind* that rock and music videos transform "life...[into] a nonstop...masturbational fantasy."

As those familiar with Bennett's attacks on Time Warner and Interscope Records for marketing gangsta rap might anticipate, what particularly exercises Bennett is the way in which Big Culture's never-mind-the-bollocks fixation on the bottom line grows the market for such fare. "It was once understood that the entertainment industry would exercise corporate responsibility, even to the point of self-censorship," writes Bennett. "There were lines the profit-seekers would not cross. No more. We now

see companies like Seagram/Universal, Sony, BMG, and others exploiting the youth rebellion instinct—and even expanding it. Michael Green, the president of the National Academy of Recording Arts and Sciences, which awards the Grammies [sic], recently said this (specifically in reference to drug use): 'We happen to be an industry [rock music] that runs fast, it runs hard, it sells the manifestation of the rebellion that kids need to exercise. I mean, it's their job to rebel and we sell that rebellion.'"

For Bennett, such coldly calculated, profit-maximizing anarchy is bad enough when confined to the music business. But it hasn't stopped there, he observes—*all* sorts of products now invoke such calls to insurrection and the pursuit of pleasure. "We see much the same philosophy in other industries," he observes. "Saab tells us to 'Peel off inhibitions'; Burger King instructs us that 'Sometimes you gotta break the rules'; and Healthy Choice cereals assures us that if you want to be happy, 'You gotta make your own rules.'" Such exhortations, argues Bennett, lead to a "nihilistic cultural environment that says there are 'No Limits.'" ('No Limits' has been the tag line for products such as Diet Coke and Reebok sneakers. Bennett's reading of the phrase illustrates the conservative penchant for equating choice with nihilism. It can also be read easily as a call to self-improvement rather than a cry for moral transgression.) True to right-wing form, Bennett dates the decline as beginning in the 1960s, a period in which "many adults no longer pushed back" against the "propensity of the young to rebel and push the limits."

To be sure, Bennett and Frank are upset for very different reasons. Bennett worries that people will follow mass directives toward rule breaking and unrestraint to the point that they will actually stop being diligent, hard-working, and virtuous. That is, the effect will be to destroy the current order or, perhaps more precisely for Bennett, his vision of 1950s America. Indeed, in his writings, which are packed with references to a "palpable cultural decline," "a society in decline," and "social regression," Bennett seems to assume the disaster has already taken place. He wanders the riven landscape like a moral claims adjuster, often calculating precise dollar estimates of the damage.

Frank, however, is concerned that radical social change—that is, *real* revolution, the sort in which the workers of the world unite—is being stymied by commercial appeals to faux-rebellion. Referring to Daniel Bell's *The Cultural Contradictions of Capitalism*—a book which hugely informs both right- and left-wing critiques of consumerism—Frank notes that as consumers, we are taught to spend, spend, spend, whereas "the workplace still demands the...values of diligence and sublimation." Frank suggests that "[h]ip consumerism resolves the 'contradiction,' at least symbolically....Our celebrities are not just glamorous, they are insurrectionaries; our police and soldiers are not just good guys, they break the rules for a higher purpose. And through them and our imagined participation in whatever is the latest permutation of the rebel Pepsi Generation, we have not solved, but we have defused the problems of mass society."

Where '60s-era leftists urged radicals to "maximize the contradictions," Frank recognizes that "capitalism" is quick to outflank such vanguard tactics and create its own brand of "perpetual revolution." In this, he echoes any number of left-wing critiques, such as this one by literary critic Gerald Graff: "The essence of capitalistic reality is its unreality, its malleable, ephemeral quality, which provides little in the way of a resisting medium against which personal identity is formed."

But different as they may be on an overt political level, Bennett's and Frank's concerns are nonetheless rooted in a common source: an embrace of top-down authority as the ultimate, rightful source of value and structure in society. In the postscript to *The Constitution of Liberty*, "Why I Am Not a Conservative," F.A. Hayek noted that conservatives and socialists ultimately agree on issues of power and coercion. "Like the socialist," wrote Hayek, the conservative "is less concerned with the problem of how powers of government should be limited than with that of who wields them; and, like the socialist, he regards himself as entitled to force the value he holds on other people." Where libertarians or classical liberals argue that "neither moral nor religious ideals are

Heavyweight Spokesman: Do Macintosh computer users see themselves as techno-versions of Muhammad Ali—or Rosa Parks, Buzz Aldrin, or the Dalai Lama, whose images are also used by the computer maker? Ironically, most right-wing and left-wing critiques of "consumerism" focus on the producer as both the creator and definer of value and meaning. The result: The consumer is knocked out of the analysis.

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proper objects of coercion...both conservatives and socialists recognize no such limits."

Transposed into discussions of culture, this common tendency leads to an exclusive focus on the producer rather than the consumer as both the creator and definer of value and meaning. *The Conquest of Cool*, writes its author at the outset, "is a study of cultural production rather than reception, of power rather than resistance; it does not address the subject of consumer evasiveness except as it is discussed by advertising executives and menswear manufacturers."

Just as the final selling price of a good or service is not set by producer fiat, neither are psychic value and meaning solely a function of producer intent. These things are subject to intense, ongoing negotiations between buyer and seller; their ultimate meaning is hashed out in the no man's land of the commercial, intellectual, and emotional marketplaces.

Bennett similarly focuses on the "corporate boardroom." While granting that corporations are responding to consumer demand in creating rebellious imagery, he nonetheless accuses corporations of consumer "exploitation" that must not be allowed. Indeed, Bennett likens corporations to permissive parents who have forgotten how to restrain and discipline their rambunctious children. The result is that, in Bennett's and Frank's analyses, consumers drop out of the equation—or, what amounts to the same thing, are infantalized. By definition, they—we—must be cared for by parents of some sort, whether right-wing, left-wing, or corporate.

Such a baseline premise leads to impoverished analysis. Both Bennett and Frank acknowledge that relative general affluence in postwar America gave rise to advertising that seeks to create symbolic value for products. But why then does rebellion, like sex, seemingly sell so well in an American context? Oddly, neither Bennett nor Frank seems particularly interested in casting back into pre-1960s history for answers as to why rule-breaking and individualism might be dominant motifs, despite a long and popular American tradition of nonconformity that includes such events and figures as Roger Williams, the Antinomian Crisis, the American Revolution, Henry David Thoreau, John Brown, the Civil War, and women suffragists (one might add that Ben Franklin's autobiography, one of the great early milestones of our national literature, is explicitly a blueprint for individual fulfillment via rule breaking). Similarly, Bennett never wonders why, if it is symbolic rejection of social mores that sells records, Cannibal Corpse's 1994 ditty, "Stripped, Raped, and Strangled" —cited by Bennett as representative of today's hit parade— didn't actually top the charts.

From a top-down perspective the actual commercial fate of any product is less important than its mere existence. Ultimately, such an approach to culture relies too heavily on the intentions of the producers (an especially unwise approach when dealing with ad men), cutting out the fuller social context. Just as the final selling price of a good or service is not set by producer fiat, neither are psychic value and meaning solely a function of producer intent. These things are subject to intense, ongoing negotiations between buyer and seller, producer and consumer, author and reader; their ultimate meaning is hashed out in the no man's land of the commercial, intellectual, and emotional marketplaces.

For example, are diners who chow down on Pizza Hut's "Edge" pizza —the ads for which insist consumers "Take it to the edge!"—vicariously indulging in an extreme sport or act of moral subversion? Or do they eat the pie—or choose not to—for other reasons altogether? What role does the pizza's actual physical attributes—toppings, sauce, crust, etc.—play? Precisely on what psychic terms, say, do people "do" Mountain Dew? Do consumers identify with its skateboard-thrashing, snowboard-riding shills? Do some retrograde drinkers recall its old hillbilly image and guzzle it as an homage to simpler times? How important to its market is its day-glo color and higher-than-average caffeine and sugar content?

Despite corporate America's occasional bravado regarding its advertising and marketing prowess, its claims either to know what people want or to make people want what it has to sell, these kinds of questions are not necessarily answerable with any certainty. Are consumer focus groups representative? Can the individuals in them articulate why they choose one product over another? What is the best relationship between an ad image and the product it promotes? Why do seemingly perfectly situated products flop? And seemingly bad ones succeed? Why do modes of general cultural discourse change, what do they really mean at any given point, and is there any way to predict, much less direct, the next shift?

These are indeed difficult questions—and to the extent that they locate power, meaning, and value outside of elites who might evaluate them, manage them, and control them, they are unlikely to be addressed fully by either right-wing or left-wing cultural critics. ◆

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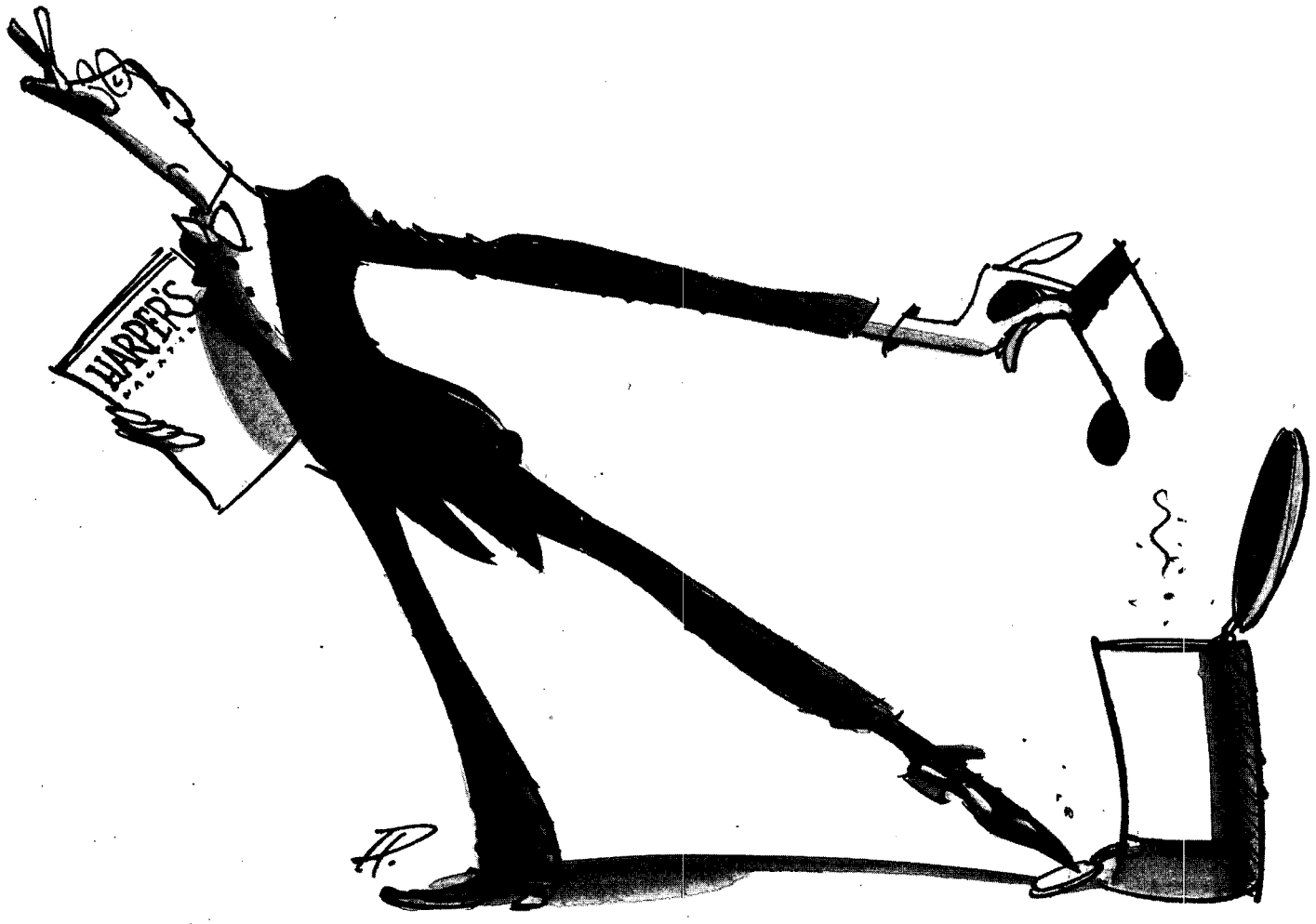
Isn't It Ironic?

The tangled discourse of anti-market snobbery at *Harper's*

By Brian Doherty

In September 1996 in Manhattan, I saw a rock band called Yum-Yum perform as part of the alternative rock industry's biggest showcase, the College Music Journal Convention. The band's label, an affiliate of Atlantic Records (part of Time Warner), had pulled out all the promotional stops. Label flacks inched their way around the crowded room, shoving Yum-Yum stickers and other paraphernalia into everyone's hands.



HENRY PAYNE

The band, which included a mini–string section, played a set of sad, pretty pop love songs. They emulated the sound and approach of old Burt Bacharach records or the *Pet Sounds*–era Beach Boys, without those masters' level of compositional complexity. I enjoyed the set, as did some other music 'zine writers at my table. Later, I even bought the record.

That made me part of an exclusive crowd. Though the Atlantic hype machine successfully placed articles about the band and its singer/songwriter, Chris Holmes, in the trifecta of *Rolling Stone*, *Billboard*, and *Spin*, fewer than 10,000 people bought the album. In L.A. music stores I saw the sure signs of a record promoted beyond its audience: used promo copies littering dollar CD bins, just months after the album's release.

This commercial failure was predictable. The type of smart, sensitive, string-laden pop Yum-Yum made hasn't been commercially viable for a very long time. Nowadays it is the music of record-collecting pop fanatics. Yum-Yum's bomb was just one more example of a major label getting overly excited about its newest find—Chris Holmes had been a bigwig in the Chicago underground music scene with his earlier band, the "space rock" Sabalon Glitz—and failing to make the rest of the world take notice. Yum-Yum toured a while, then faded from sight and most people's memories.

The type of smart, sensitive, string-laden pop Yum-Yum made hasn't been commercially viable for a very long time. Nowadays it is the music of record-collecting pop fanatics. Yum-Yum's bomb was just one more example of a major label getting overly excited about its newest find and failing to make the rest of the world take notice.

Holmes, a wealthy University of Chicago graduate, returned to Chicago—none the worse for wear, suggests rock journalist Jim DeRogatis, who wrote about Holmes in *Rolling Stone*. "Trying to be a rock star for Chris would be like spending the summer in Europe after graduating," DeRogatis tells me. "He can always fall back on teaching political philosophy at some good school." Holmes was a man of contradictions, DeRogatis suggests; while he liked to brag about being a rich kid, he hated it when writers described him that way.

In February, a new buzz about Yum-Yum started on e-mail listservs and phone lines among people who both knew the band and read *Harper's Magazine*. The March issue of *Harper's* contained a 10-page feature story about Yum-Yum, written by Chris Holmes's childhood pal and former roommate Thomas Frank. Frank is a rising leftist intellectual star who edits *The Baffler*, a magazine of cultural criticism, and writes critiques of advertising and big business.

What made this obscure failed rock band of interest to *Harper's*? Frank had a theory about the band, one with which almost everyone who had independent knowledge about Yum-Yum disagreed. The Yum-Yum record, Frank postulated, was not intended as a sincere work of popular music. It was instead an ironic gesture, an attempt to "*fake fake itself*" (his italics). Pop music was the "fake" being "faked." The album was, Frank asserted, a "critique" of "the pop-music industry" even as it was a product of it. Thus, the story fit well with the main mission of *Harper's*: helping middle- to highbrow intellectuals confirm their inchoate contempt for the modern market order.

Holmes didn't *really* like the kind of soft pop the Yum-Yum record represented, Frank asserted, referring to Holmes's "supposed" fondness for Bacharach and his "farcical" proclamations about his craft (such as "it's such a pleasure to work with" strings). According to Frank, Holmes chose the "strategy" of "claiming that his love of the lowbrow article in question [string-laden pop] is as heartfelt and genuine and un-ironic as that felt for it by the demographic for whom it was originally made."

Frank's article reads like a depressingly typical tale of failed would-be pop stardom. The only distinguishing factor is the random sprinkling of "ironically" or "tongue-in-cheek" as adjectives. Holmes goes on a package tour sponsored by *Seventeen* magazine; he writes a guest column for *Sassy*; he banters with the audience in a not-entirely-sincere way; he crafts a press kit from which rock journalists repeat details without checking them.

Frank follows Yum-Yum on tour to a Fort Wayne, Indiana, bar and stares agog at badly dressed and groomed Midwesterners who "had honed and refined their hedonism to an edge far sharper than what one finds in the larger cities. Their Midwest wasn't about prayer or hard work....It was about drunkenness, cocaine, and copulation"—all unknown, apparently, in the "larger" and presumably more refined cities. There, I suppose, people are merely convivial, use conversation-enhancing stimulants, and make love. To Frank, the irony in which Holmes swims arises inevitably from the sick failures of capitalist modernity: "Fake earnestness, earnest fakeness...[are]...both of them equally cozy within the market order and between them represent...all the options left to us anymore."

By the time I got my copy of the March *Harper's*, I had already heard, via e-mail lists or phone calls, complaints about the story's dubious premise from about a dozen Yum-Yum–conscious *Harper's* readers. The executive editor of *Spin* magazine, Craig Marks, was peeved enough to write in *The Village Voice*

An entertainer who puts on a game face during a *Seventeen*-sponsored tour and then mocks it afterward isn't necessarily being "ironic," any more than a fast-food clerk is being "ironic" when he evinces a concern for a customer's order that he doesn't really feel. But Yum-Yum's Chris Holmes is supposedly different for a quintessentially *Harper's* distinction: Holmes, you see, is "a very smart guy."

that he found Frank's account "*bafflingly* misguided." Marks suggested the real story was probably that "Holmes, too embarrassed to admit to his hard-ass buddy that...he actually liked girly-pop ...fed Frank a steaming plate of cred-saving bullshit. And Frank bought it....Now *that's* ironic."

Peter Margasak, a rock critic with the alternative weekly *The Chicago Reader* who has covered Holmes's career, says he "was just stunned" by the article. "No one in Chicago would believe for a second" that the Yum-Yum record was not a sincere and seriously intended shot at rock stardom.

Darcy Vaughn, Yum-Yum's viola player, acknowledges that it's difficult to do some of the things pop stardom involves, such as getting dolled up and posing for promo shots, without an inner chuckle. Still, she insists that Holmes never behaved with anything less than utter sincerity about the music he was making. In the studio, Vaughn says, he would solemnly relate how certain lyrics came to him in a dream after a breakup with a beloved. The album consisted of sweet, open-hearted, string-laden love songs, and Vaughn recalls that Holmes always professed a genuine affection for that kind of pop—"especially with prospective girlfriends."

In his *Voice* piece, Marks called Holmes one of "the schmooziest musician[s] I have ever encountered." Margasak, the *Chicago Reader* critic, knew him as someone who went around town bragging about what a huge rock star this Yum-Yum record would make him. The consensus of those who know Holmes is that he badly wanted to make it big and that the Yum-Yum record was a sincere attempt at doing so.

It appeared to most of these people that Holmes and/or Frank had in effect pulled something over on *Harper's*. Margasak says Frank discussed interviewing him for the story but never followed through. Vaughn remembers talking with Frank when he accompanied the band for three days of touring but says she had no idea that irony would be a central theme of the story.

I was fascinated by the notion of a publication like *Harper's*, one of America's leading intellectual magazines, running an almost entirely single-sourced story by a childhood pal of the subject that struck almost every knowledgeable reader as screwy, if not flat-out wrong. In response to the criticism, *Harper's* Senior Editor Ben Metcalf denies that the story said what I, Marks, and others thought it said. Frank's point, he says, was not that Holmes didn't like Yum-Yum's kind of music but that any intelligent person must have a relationship with popular culture that is multi-leveled: Someone who collects Elvis kitsch might not *really* like Elvis; but obviously, on some level, he feels an attraction. This oh-so-sophisticated take is what made an otherwise unremarkable story about a failed rock band worthy of *Harper's*.

On the face of it, an entertainer who puts on a game face during a *Seventeen*-sponsored tour and then mocks it afterward (as Frank suggests Holmes did) isn't necessarily being "ironic," any more than a fast-food clerk is being "ironic" when he evinces a concern for a customer's order that he doesn't really feel. But Metcalf thinks Holmes is different from other performers because of a quintessentially *Harper's* distinction: Holmes, you see, is "a very smart guy." Metcalf repeats this phrase like a mantra during our conversation. Whereas a Mariah Carey or a New Kid on the Block (to use his examples) does the show business grind without any awareness of its silliness, someone like Holmes *has* to know better. In other words, a Venezualan-Irish girl from Long Island and a bunch of Boston street kids are just pop-star

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puppets going through the motions. But Chris Holmes, a wealthy University of Chicago graduate, must be different—even if, to outside observers, the game's the same.

This sort of attitude is pervasive in *Harper's*. Exposing the entertainments of the hoi polloi, especially the hoi polloi outside Manhattan, as pathetic, sad, and disturbing is a popular exercise for the magazine's writers. *Harper's* hires superhip novelist David Foster Wallace (author of *Infinite Jest*) to write long features making fun of cruise ships and Midwestern fairs; *Harper's* is where excellent young *New Republic* writer Stephen Glass goes to skewer telephone psychics.

Metcalf explains that Frank's article about Holmes was really much more *complicated* than I thought. If it seemed to say one thing, it was really saying something else as well. Irony is a game of and for "very smart guys"—*Harper's* readers. In Frank's story, Marks observes, "all the other musicians are dumb, pop rock is dumb, the music industry is dumb, music journalists are dumb, other rock bands are dumb, people in the Midwest who go to bars to see rock bands in their mullet haircuts are dumb, and the only smart people in the whole scene are Tom Frank and Chris Holmes."

The story of Yum-Yum could easily be read as illustrating the frequent *impotence* of the capitalist "culture trust" whose power Tom Frank rails against. The promotional might of Time Warner (even coupled with Holmes's "very smart guy" ironic manipulation of the press) led, as it so often does, to a money-losing flop. But that angle just wouldn't suit *Harper's*.

Frank stands firmly by his interpretation of Yum-Yum, saying Holmes's apparent sincerity does not in any way contradict an ironic intent. He explains Holmes's bragging about "the project's certain success and his impending stardom" as merely behaving "in character." Holmes himself utters the word *ironic* only once in the article, saying, "No one thought it was funny or ironic that we were doing *Seventeen* shows. Nobody got it. Nobody knew who we were." What was there to get? Would-be pop stars do things like that. It's their job.

After asking me if I was an English major, Frank begins lecturing me on the fallacy of intention, wondering why I'm asking *him* to explain his story. The article strongly implies that Frank has special insight into Holmes's intentions: It announces his longstanding friendship with the subject in its first paragraph, and its obsessive, single-sourced following of Holmes makes it appear that Frank's interpretation derives from his subject. But then, crediting Holmes with ironic intent just because he claimed it would also be a fallacy of intention.

In the end, it's hard to pin down Frank's position. But a *Harper's* piece doesn't have to make a clear point. The front of the magazine is devoted largely to reprints of documents, articles, and images, usually presented with insouciant sarcasm and meant to be laughable. The magazine's features, by contrast, are of overwhelming deadpan sententiousness, or at least seem to be. In *Harper's*, it's hard to know what to make of anything. As a longtime reader, I often *hope* the editors are only kidding—as when they offered up novelist Annie Dillard's set of disconnected statistics about mass deaths or devoted nine pages to meditations about the deeper meaning of running over birds.

But there is at least one sincerely felt attitude that *Harper's* Editor Lewis Lapham spreads like an inky miasma over the whole magazine: He treats the horror of modern capitalism as self-evident. The story of Yum-Yum could easily be read as illustrating the frequent *impotence* of the capitalist "culture trust" whose power Frank rails against in his other writings. After all, the promotional might of Time Warner (even coupled with Holmes's "very smart guy" ironic manipulation of the press) led, as it so often does, to a money-losing flop. But that angle just wouldn't suit *Harper's*.

The issue in which Frank's article appears also contains a Lapham editorial attacking *Washington Post* columnist (and Reason Foundation trustee) Jim Glassman for "find[ing] no reason to think that the barbarism implicit in the restless energies of big-time global capitalism requires some sort of check or balance...by a lively...practice of...democratic politics." The essay is a bitter condemnation of the market order without a hint of explanation of what exactly is so hideously wrong with it (especially as compared with the alternatives).

Frank, who snagged Lapham to write an introduction to one of his books, echoes Lapham's foggy bitterness when he blames the dominance of "fake earnestness, earnest fakeness" on the market. Basing his conclusion on the unproven and insulting notion that no one—or at least no *smart* person—can genuinely love capitalist products such as pop music, Frank, like Lapham, practices a snobbery without understanding. The enemies of capitalism used to argue that it would lead inevitably to war and the steady immiseration of the working class. Now, the best they can muster against it is that it's just too, too vulgar. I'm not sure whether this weakening of anti-capitalist rhetoric is ironic, but it is worth thinking about as the century in which the market order overcame its most powerful challenges draws to a close.

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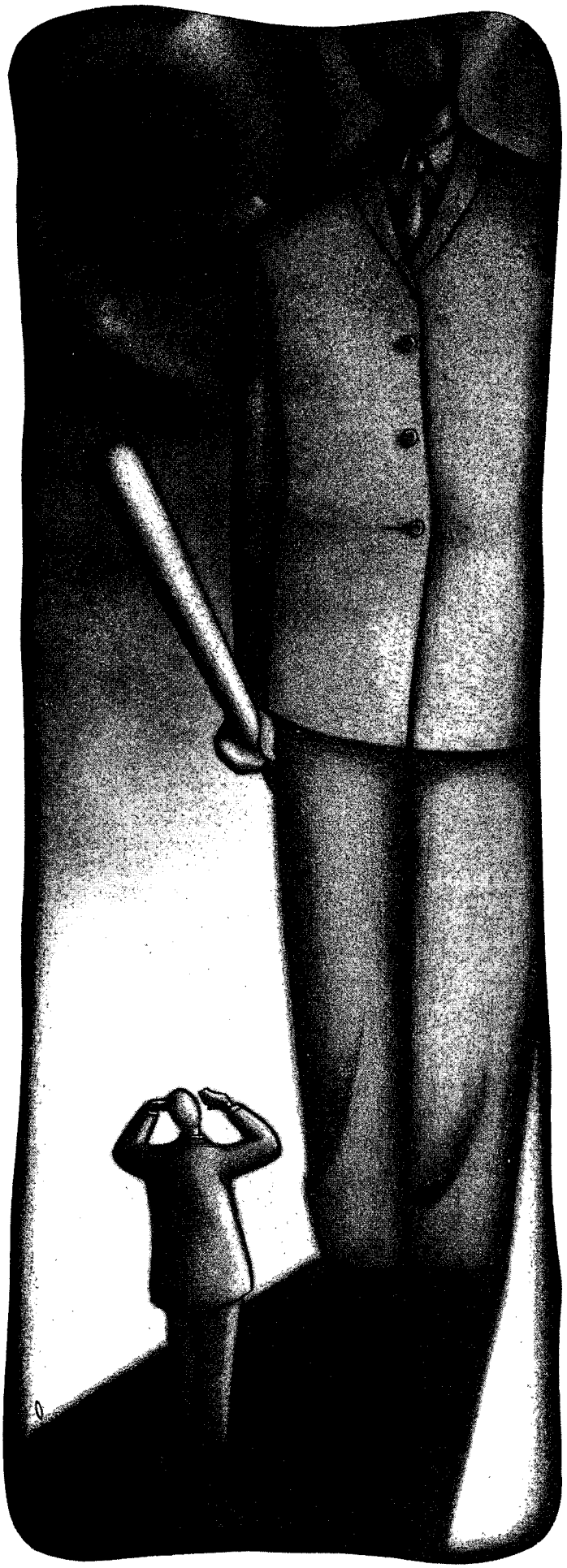

Shades

How state regulators and the private sector are making environmental policy more effective and less intrusive

By Alexander Volokh

A few years ago, Mary Gade realized that managers of small businesses in Illinois were scared to death of being severely punished for accidentally violating complicated environmental laws. These managers were so scared, in fact, that they often didn't want to ask for the state's help in fixing their environmental problems. Gade thought that was a shame, and as the director of the Illinois Environmental Protection Agency, she was in a position to do something about it. In 1995, Gade set up Clean Break, a program that offers small businesses help in complying with environmental regulations and relief from penalties, provided they fix their problems within a reasonable time.

Gade also felt that contaminated industrial sites in Illinois were taking too long to redevelop. The cleanup standards were unrealistically strict, and developers were afraid that if they took the trouble to clean up a site, they not only would have to waste money chasing the last stray molecule of pollution but could be sued by a future user of the property for contamination they didn't even cause. Many sites were abandoned or remained perpetually undeveloped. In 1993, the Illinois EPA created a set of flexible cleanup standards and limited liability releases that have made possible the voluntary redevelopment of hundreds of contaminated sites.

Gade, who worked for the U.S. EPA for 13 years before heading the Illinois EPA, stresses that these kinds of imaginative initiatives would have been impossible at the federal level. "States are particularly well positioned" for experimentation, she says. "We make great laboratories." Gade adds that the U.S. EPA may no longer be the best place to make many sorts

ILLUSTRATIONS: TROY THOMAS

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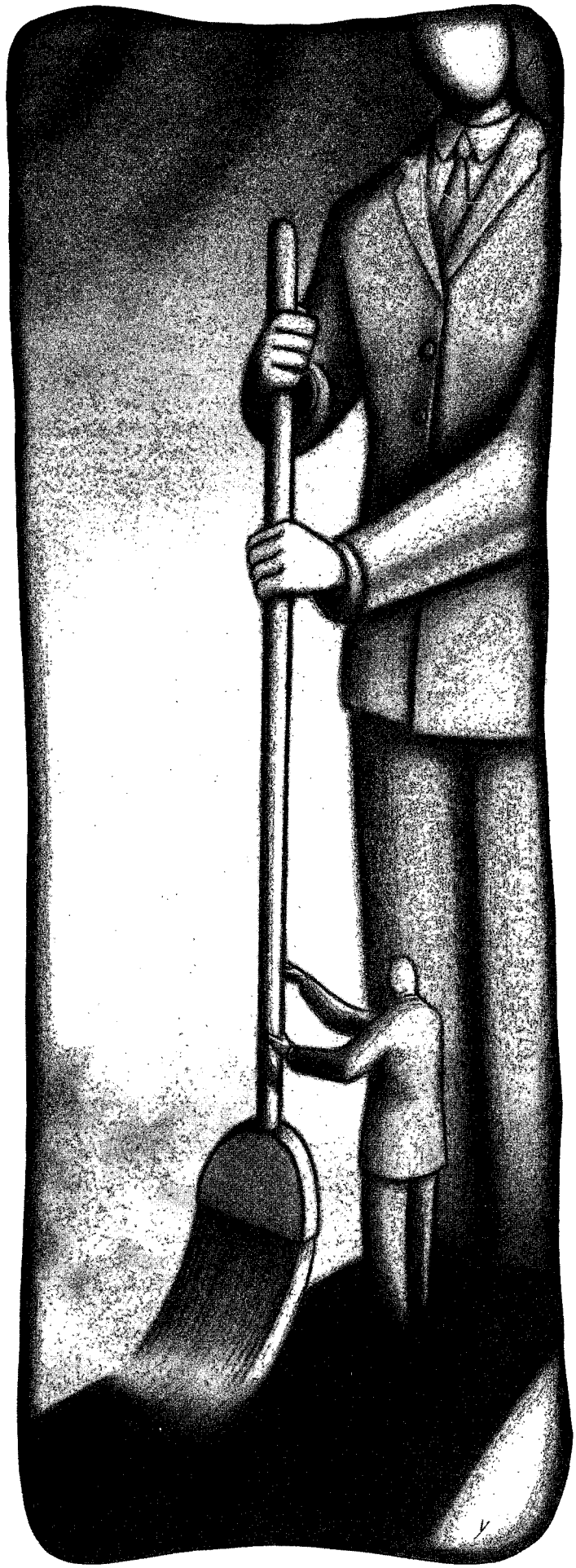


of environmental decisions. "The federal government is not being as helpful and constructive as they could be," she says, and "the environmental management system of this country, after 30 years, is ready for a major rethinking and overhaul."

Environmental regulation is undergoing a sea change in the United States. The old environmental vision, shaped in the 1960s and '70s, was crisis-driven. It distrusted markets, property, and the private sector, and so punishment rather than cooperation was the preferred method for getting people to comply with the law. It assumed that environmental problems and conditions were pretty much the same everywhere and accordingly called for one-size-fits-all regulations mandating acceptable technologies and approved cleanup methods. The regulations were written by government experts, and it was taken for granted that environmental problems would be solved through the public sector. Furthermore, the prevailing wisdom said the states were incompetent regulators who would strike cozy deals with evil polluters and "race to the bottom," cutting environmental standards to attract businesses. Federal regulators were the ones wearing the white hats.

The new vision of environmental regulation stresses problem-solving instead of punishment. It seeks flexibility in compliance methods so that companies can choose the cheapest way of achieving a given level of environmental quality, instead of having to adopt a single prescribed method. It views the private sector as a necessary partner in environmental improvement. And it tries to bring decision-making authority to the lowest level where it makes sense—so that local problems can have local solutions, state problems can have state solutions, and national problems can have national solutions.

Over the past few years, several states have begun to implement reforms embodying these principles. Their experiences contradict the race-to-the-bottom theory, which does not allow for the possibility that state-driven environmental protection could achieve superior results at lower cost, with less regulation and less intrusiveness. These are some of their stories.

"Brownfields" of Dreams

"Superfund," says Jim Seif, secretary of the Pennsylvania De-

"I don't care about being nice," insists a division chief at the California EPA. "I care about getting people to comply, and I will use whatever it takes. If I thought that if I put half the population in jail I could get what I wanted, that would be fine by me. But that doesn't work."

partment of Environmental Protection (DEP), "is the least effective federal environmental statute in history." Seif is referring to the federal law dealing with hazardous site cleanup, officially called the Comprehensive Environmental Response, Compensation, and Liability Act. Superfund was enacted in 1980, in the wake of the Love Canal scare. Today it is widely criticized for making cleanups needlessly expensive and time-consuming, for engendering unnecessary litigation, and for making it almost impossible to return a contaminated site to productive use.

Fortunately, the Superfund program applies only to the sites classified by the federal government as most contaminated. For the remaining sites, known as "brownfields," the Pennsylvania DEP developed the Land Recycling Program, which was authorized by state legislation passed in 1995. The program standardizes cleanup procedures, so owners and potential developers know exactly how much cleanup is necessary. It sets realistic goals—unlike Superfund, which established what Seif describes as "Garden of Eden" standards, "a practice which, of course, produced no cleanups" because of the prohibitive expense. Pennsylvania grants liability releases to owners, developers, and financial institutions that are otherwise reluctant to clean up properties for fear that they will be sued by future owners. And it provides some funding assistance, though most of the cleanups are conducted at private expense.

In contrast with Superfund, the DEP tries to avoid prescribing the specific technology to be used in the cleanup, instead only saying how clean the site should be. While the Pennsylvania program is still prescriptive in some areas, the regulations are by and large based on actual environmental and health risks, encouraging businesses to develop innovative cleanup methods. Instead of requiring the complete elimination of chemicals left by commercial activity, the state sets acceptable levels based on established risks to human health and the environment, taking into account the intended use of the property. (Residential sites, for example, have to be cleaner than industrial sites.) As one DEP official puts it, "We have kind of taken a novel approach in Pennsylvania, trying to base our cleanup program on sound science."

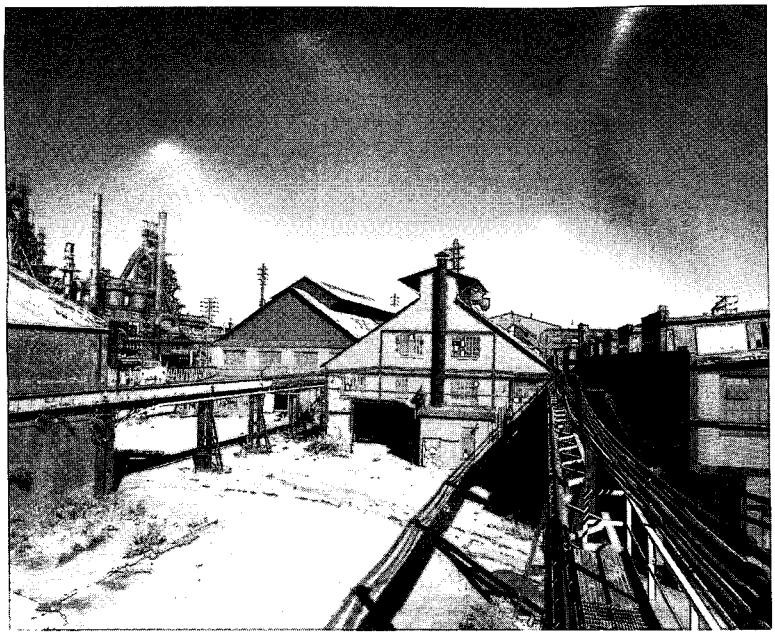
Previous state law held current owners responsible for cleanup, even if prior owners were responsible for the contamination; as a result, it was sometimes more cost effective to abandon a site than to restore it. The Land Recycling Program releases owners or developers of a site from liability associated with their cleanup, as long as the work is done according to specified standards and procedures. State grants or low-interest loans can cover up to 75 percent of the cost of completing an environmental study and implementing a cleanup plan. Once the property has been cleaned up, the DEP releases the landowner from state liability, and state law provides protection from citizens' suits.

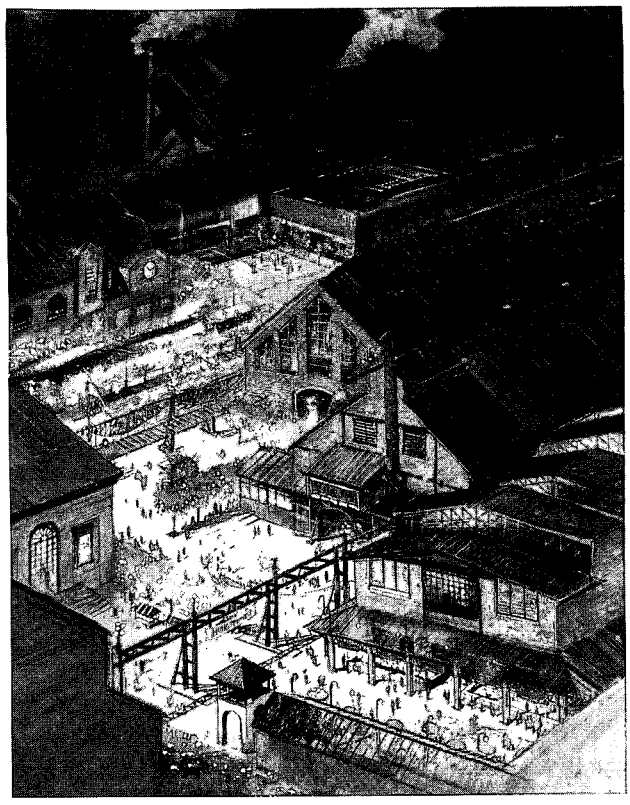
One of the highest-profile properties to be redeveloped under the program is the 160-acre site of a shuttered plant owned by Bethlehem Steel. In February 1996 the company signed a partnership agreement with the Smithsonian Institution to establish the National Museum of Industrial History on the plant site, which is being tested for the presence of heavy metals and other materials associated with steelmaking. The first stages of the project—sampling the soil and monitoring the ground water to determine what sort of cleanup is necessary—are mostly completed. The company expects that not much cleanup will be required beyond tearing down buildings and removing debris. Some soil might have to be removed, but more drastic methods, such as pumping and treating ground water or putting in large underground walls to isolate it, are not expected to be necessary.

Once the cleanup is finished, any residual contamination shouldn't pose any health problems because the property will be covered with clean soil, parking lots, and buildings. The museum, which is expected to open in 2001, will be part of a larger education and entertainment complex. "It's been said that Pennsylvania has the most progressive brownfields law in the country," writes Hank Barnette, chairman and CEO of Bethlehem Steel. "Certainly, this is making possible the revitalization of our site in Bethlehem that might otherwise have had a very limited future."

Direct comparisons between Superfund and the state program are tricky, since they cover different types of sites. But in the brief existence of the Land Recycling Program, more than 300 sites have been enrolled and 100 have been cleaned up, while over the last 16 years the Superfund program has worked on 33 of 103 sites in Pennsylvania, and just 10 of these have been removed from the list.

Pennsylvania officials were therefore annoyed at recent federal efforts to limit the scope of state brownfield cleanup programs. One obstacle to cleanups was that no matter what the state guaranteed, the federal government could decide that a site needed additional work under Superfund. To avoid this problem, some states have signed "memoranda of agreement" (MOA) with the U.S. EPA, essentially stating that if a site enters the state cleanup program the feds will leave it alone. In September 1997, the U.S. EPA released a guidance document severely restricting the con-





O Little Site of Bethlehem Steel: Shuttered Pennsylvania plant (above) and planned museum for same property. Where Superfund legislation demands impossible "Garden of Eden" standards, flexible state-level laws actually facilitate cleanups and redevelopment.

BETHLEHEM STEEL CORPORATION

ditions under which it would sign an MOA: The more flexible a state tried to be in its efforts to get sites cleaned up quickly, the less likely it was to get an MOA. State regulators called the new federal guidelines overly prescriptive and unnecessarily intrusive.

Last November, under intense criticism from state environmental officials, the U.S. EPA withdrew the guidance document, but it has yet to develop a policy of encouraging state experimentation with brownfield cleanup programs. To many state officials, the best federal policy on the matter would be to butt out. "We think that the federal government needs to basically stay out of state business when it relates to brownfields and cleanup programs," says Jim Snyder, director of the Bureau of Land Recycling and Waste Management at the Pennsylvania DEP. The feds "see themselves as being Big Brother and Big Sister to the states, and the states are not interested in that."

In Search of XL-ence

Roger Kanerva, an environmental policy adviser with the Illinois EPA, bristles at the mention of the letters *XL*. "Please don't use the *XL* word," he admonishes. "We are not fans of XL." He rolls his eyes and shakes his head.

Project XL is a U.S. EPA program for companies with "XL-ent" environmental performance. Introduced by the White House in 1995 as an "enforcement experiment," it was designed to provide an alternative to the standard system of one-size-fits-all regulations. In theory, facilities that showed they could attain superior environmental results would be granted more flexible permit conditions. The EPA would refrain from punishing violations if a participating facility was acting in good faith.

3M, which makes a wide range of consumer products, medical supplies, and manufacturing materials, applied to the XL program for plants in Minnesota, Illinois, and California. The Illinois EPA supported the Illinois part of the effort and worked with 3M to get the XL project approved. U.S. EPA approval for the XL program was contingent on "superior" environmental performance, but the standard turned out to be a moving target. "What you thought was superior before," Kanerva recalls, "suddenly [wasn't]. We were always one step behind their new definition of how wonderful your project had to be." For instance, while "superior" started out meaning "better than required by existing laws," it ended up meaning "better than the company was performing already"—which penalized companies like 3M, which were already performing substantially better than laws required. Finally, 3M dropped out of the XL program. Frustrated with the vagueness and inconsistency of the federal criteria, the Illinois EPA refused to participate further.

Other companies that have explored the XL program have had experiences similar to 3M's. Part of the problem seems to be the U.S. EPA's inflexibility. The Environmental Council of the States, which represents state environmental agencies, charged that the U.S. EPA mishandled the project by adopting "rigid criteria...in the eleventh hour" and by not allowing a larger role for the states. But even if federal regulators wanted to be flexible, the laws wouldn't give companies much leeway to pursue innovative approaches. Regardless of whether the U.S. EPA punishes a violation, a private individual could always sue

If regulatory goals are unreasonable, and an agency adopts more flexible ways of accomplishing those unreasonable goals, is that success? If one defines success as the best of all possible worlds, one is sure to be disappointed by both federal and state reforms.

over a company's statutory violations.

Disappointed with the XL program, the Illinois EPA prepared its own Environmental Management System (EMS) legislation, which was signed into law in June 1996. The statute gave the agency five years, from 1996 to 2001, to enter into agreements with companies that want to try out new ways of complying with regulatory requirements. This pilot EMS program is open to companies that seek to streamline their permitting procedures or adopt "innovative environmental measures." The Illinois EPA insists that a company's EMS emphasize actual environmental performance, focus on pollution prevention, and guarantee extensive consultation with community groups and leaders. "For this program," says the Illinois EPA, "the most important ingredient is the desire of a regulated entity to chart its own course for environmental progress and to be fully accountable for its performance."

The program is voluntary: No company must join, and the Illinois EPA is not bound to enter into an agreement with any company. The fact that a company chooses to participate means that the agreement makes sense for the company, and the fact that the Illinois EPA agrees means that it expects environmental improvements. The agency doesn't require that the potential for improvement be demonstrated beyond a doubt, which is what stymied the XL program. It reserves the right to approve interesting, innovative projects that *might* lead to significant environmental benefits.

3M was the first company to negotiate an EMS agreement with the state. The agreement would require 3M to set a waste reduction goal for its adhesive tape factory in Bedford Park and to measure its progress toward that goal. It would lower the ceiling on 3M's emissions while giving the company more flexibility in its day-to-day operations. To avoid problems with the U.S. EPA, the agreement does not address any issues of federal law or permitting.

State officials expect to finalize the agreement with 3M by the end of the summer. Tom Zosel, 3M's manager of environmental initiatives, says the company is optimistic about the arrangement: "We get some operational flexibility, we get better relations with the local community, and the agency gets more information and oversight on our facilities in a way that is less regulatory and less command-and-control. We're making commitments on what we're going to achieve that are better than what the regulations require."

The Illinois EPA hopes to approve a few dozen EMS agreements over the next five years and use the experience to develop new regulations. This learn-by-doing strategy contrasts sharply with the federal approach, which Kanerva describes as a "one-size-fits-all, cookie-cutter, do-it-our-way-or-take-the-highway type of thing." As the Illinois EPA's Bharat Mathur puts it, "One of the reasons XL didn't work is because, typically, when we do something new, there is this great desire to put it into regulation, rules, and guidance. And that's where it gets sticky, because you cannot accommodate all new, emerging situations into rules and guidance right off the bat."

Comical Solution

"I'm not a warm and fuzzy person," says Jim Morgester, compliance division chief for the Air Resources Board at the California EPA. "I am a dyed-in-the-wool enforcement type. I have a military background." But while Morgester was brought up on enforcement, he sees it as a tool, not as an end in itself.

Morgester regulates businesses that generate air emissions, including gas stations, dry cleaners, auto repair shops, paint manufacturers, and furniture factories. Several years ago, he found that only 60 percent of the businesses inspected by the Air Resources Board were staying within emission limits, handling volatile chemicals properly, and completing required paperwork. His goal was to get that number up to 95 percent. The main reason for the widespread failure to follow the law, he concluded, was that people couldn't understand the law. Environmental rules and regulations, he points out, are written by technical people whose terminology is difficult to understand, and then rewritten by attorneys in their own language, with politicians looking over their shoulders and second-guessing the outcome. The result, he says, is "not intelligible to a lot of people."

"I don't care about being nice," Morgester insists. "I care about getting people to comply, and I will use whatever it takes. If I thought that if I put half the population in jail I could get what I wanted, that would be fine by me. But that doesn't work." He divides businesses into three groups: big companies that understand the regulations and can afford environmental auditors; smaller businesses that want to do the right thing but don't have the resources to figure out what that is; and those who, "even if they knew what the right thing was, weren't going to do it anyhow." He adds, "I would rather spend my traditional law enforcement resources on the third class, because it's easier for me socially and politically to bust the bad guys." For the others, he says, an educational approach makes more sense.

Making It Easier Being Green: Jim Seif of the Pennsylvania Department of Environmental Protection (left) and Mary Gade of the Illinois Environmental Protection Agency. Despite prognostications by environmentalists, states have not entered a "race to the bottom." The experience with recent innovations in environmental policy indicates that the states are resilient enough to learn from their mistakes, bounce back from failures, and overcome the barriers that stand in the way of better environmental protection.

California's Compliance Assistance Program was developed in 1988, before such programs had become popular nationwide. For technically knowledgeable managers, Cal/EPA offers a set of blue three-ring binders ("blue books") that contain complete compliance information for a given type of equipment or category of business. For line workers, the program offers nontechnical, comic-book–style information, which is sometimes published in Spanish or Korean as well as English, depending on the type of business involved.

The self-inspection handbook for the dry cleaning industry shows green drums labeled "Waste" with voice bubbles saying "Store and label properly." "And seal tight," proclaim large yellow block letters across the rest of the picture. The handbook includes sample checklists where workers can enter how many pounds of clothes were in each load and keep a service and repair log for the equipment. "Use these...to help prevent a notice of violation," a large talking iron says.

There's a Spanish-language version of the inspection manual for auto repair shops, which tells shop owners about all the different government agencies with the power to regulate them, from fire departments to OSHA to local pollution-control districts. While reminding them that "*¡Las violaciones son costosas!*" (Violations are costly!), the manual shows pictures of unsealed solvent containers, open paint cans, and soiled rags exposed to the air, all of which result in the emission of volatile organic compounds, which contribute to smog.

Since Cal/EPA introduced training and literature for gas stations in the late 1980s, the compliance-assistance program has gradually expanded to cover other sources of emissions. From 1988 through early September 1997, the program distributed roughly 27,000 blue books and 584,000 comic books. The effort to make regulations understandable seems to be having an impact. In the early 1990s, Cal/EPA studies showed that about half of all businesses that use solvents failed to follow the applicable regulations (designed to limit the release of harmful chemicals into the environment). The agency found that the technical manuals and comic books cut noncompliance rates within each industry by 50 percent to 60 percent within a year of their introduction into that industry. By using vapor recovery handbooks, one major gasoline retailer reduced emission-related violations by more than 70 percent over an eight-month period.

Such figures do not tell us whether there were corresponding improvements in the environment and, if so, whether they were worth the cost involved. But regulators such as Morgester argue, reasonably enough, that it's not their job to judge the wisdom of the environmental goals set by policy makers.

There are other limits to compliance assistance. Because of the high turnover rate in industry, Cal/EPA's efforts must be ongoing to be effective. New employees have to be trained, or the habits that foster compliance fall by the wayside. And traditional environmentalists argue, not without reason, that while a regime of strict punishment may seem unfair to small businesses that break the rules unintentionally, it deters sloppiness as well as deliberate violations. Business people who are scared of regulators may be scared enough to take extra precautions and avoid mistakes. It is possible to imagine an environmental agency that is too fixated on compliance assistance, to the point where it ignores important problems that require enforcement. And it is the threat of penalties that often drives businesses to the compliance-assistance program in the first place.

Morgester himself believes that the success of the compliance-assistance program depends on inspections, which encourage diligence. He stresses that too many people make a conceptual distinction between helping businesses understand the regulations and traditional enforcement efforts. "They go hand in hand," he says. The situation to avoid, says Morgester, is one where enforcement officers see their job as writing tickets and compliance-assistance people see their job as handing out blue books. Such programs foster tension between the two divisions, encouraging the belief that there are two competing and mu-

"It's not exactly as if people are flocking to our doors saying, 'I can't wait to try something innovative,'" muses Mary Gade of the Illinois EPA. She recalls a senior executive from a company she regulated who said of a flexible compliance program, "I want you to tell me what to do!"

tually exclusive philosophies at work within the agency.

"You have only one goal," Morgester says. "I want the emissions to the atmosphere to be reduced so that we get the benefit of the rules and regulations....And if I can get that by being kinder or gentler or nicer-smelling, by buying them lunch, if I had the resources, I would buy them lunch in a second. If I can get that by giving them a blue book, I would give them a blue book in a second. If I get that by giving them a notice of violation and threatening to put them in jail, I will do that in a second. But in the real world no one of those does the job."

While separation and conflict between enforcement and compliance assistance may be counterproductive, it is the approach that prevails at many environmental agencies, including the U.S. EPA. "You cannot and should not ever separate your compliance-assistance, warm-and-fuzzy people from your traditional law enforcement," says Morgester. "It's a big mistake. It does nothing but give you headaches, and you end up wasting resources."

Slippery Successes, Flexible Failures

The essence of innovations is that we don't know whether they will succeed. For a process of innovation to succeed, individual projects must be allowed to fail. And sometimes the definition of success is slippery. If regulatory goals are unreasonable (as they sometimes are), and an agency adopts more flexible ways of accomplishing those unreasonable goals, is that success? If one defines success as the best of all possible worlds, one is sure to be disappointed by both federal and state reforms.

But in the real world, where incrementalism is often the best we can get, even a more efficient way of accomplishing wrong-headed goals is an improvement. At any rate, if failure means environmental degradation—the infamous "race to the bottom"—the evidence suggests it's not likely. The experience with recent innovations in environmental policy indicates that the states are resilient enough to learn from their mistakes, bounce back from failures, and overcome the barriers that stand in the way of better environmental protection.

Many of these barriers are psychological: the attitude among local, state, or federal officials that "the way we've always done it" is the best or the only way. No one likes change, and people often have to be prodded in the right direction. That includes business people as well as regulators. "It's sort of funny," muses Mary Gade of the Illinois EPA. "It's not exactly as if people are flocking to our doors saying, 'I can't wait to try something innovative.'" She recalls a senior executive from a company she regulated who said of a flexible compliance program, "I hate this! I want you to tell me what to do!"

Other barriers to innovation are technical, since some environmental variables are difficult or impossible to measure directly. One Nebraska regulator recalls the days of using "dust-ball buckets" to measure particulate matter. The agency would set out a bucket and, after 30 days, measure what was inside, amid the bugs and bird droppings. In an age of widespread, serious environmental problems, such inexactness was acceptable; everyone knew, broadly speaking, what the problems were, and the cost of refining environmental measures was high relative to the payoff. Nowadays, when many major problems have been solved and minor problems are harder to pinpoint, developing accurate performance measures is much more important.

But the barriers that loom largest in environmental policy are institutional, mainly growing out of the relationship between the states and the federal government. Ultimately, the devolution of environmental policy will require changes in federal law.

What functions should the U.S. EPA retain? In 1970, when the EPA was set up, one of the models suggested was the National Institutes of Health: a scientific agency in charge of setting standards, issuing bulletins, and conducting basic research, with the states actually running the programs. Instead, the EPA became a hands-on agency, running all the programs but delegating them under certain conditions to the states. Pennsylvania's Jim Seif believes a strong federal role was appropriate in the 1970s, when major environmental problems were just beginning to be addressed, but he says the time has come for a shift in authority to the states.

The U.S. EPA probably should continue to address environmental problems that affect several states, such as air pollution in the Midwest and Northeast or coordinating water-quality protection in the watersheds of rivers that border several states. It might also take on more of an international role, enter into more public-private partnerships, put more emphasis on scientific research, and encourage the development and transfer of pollution-reduction technology. "Those remain roles that would elude most states in terms of their focus and in terms of their budget," says Seif. "Issuing permits does not elude me. I do more of that than any EPA region....They don't need to occupy the field anymore."

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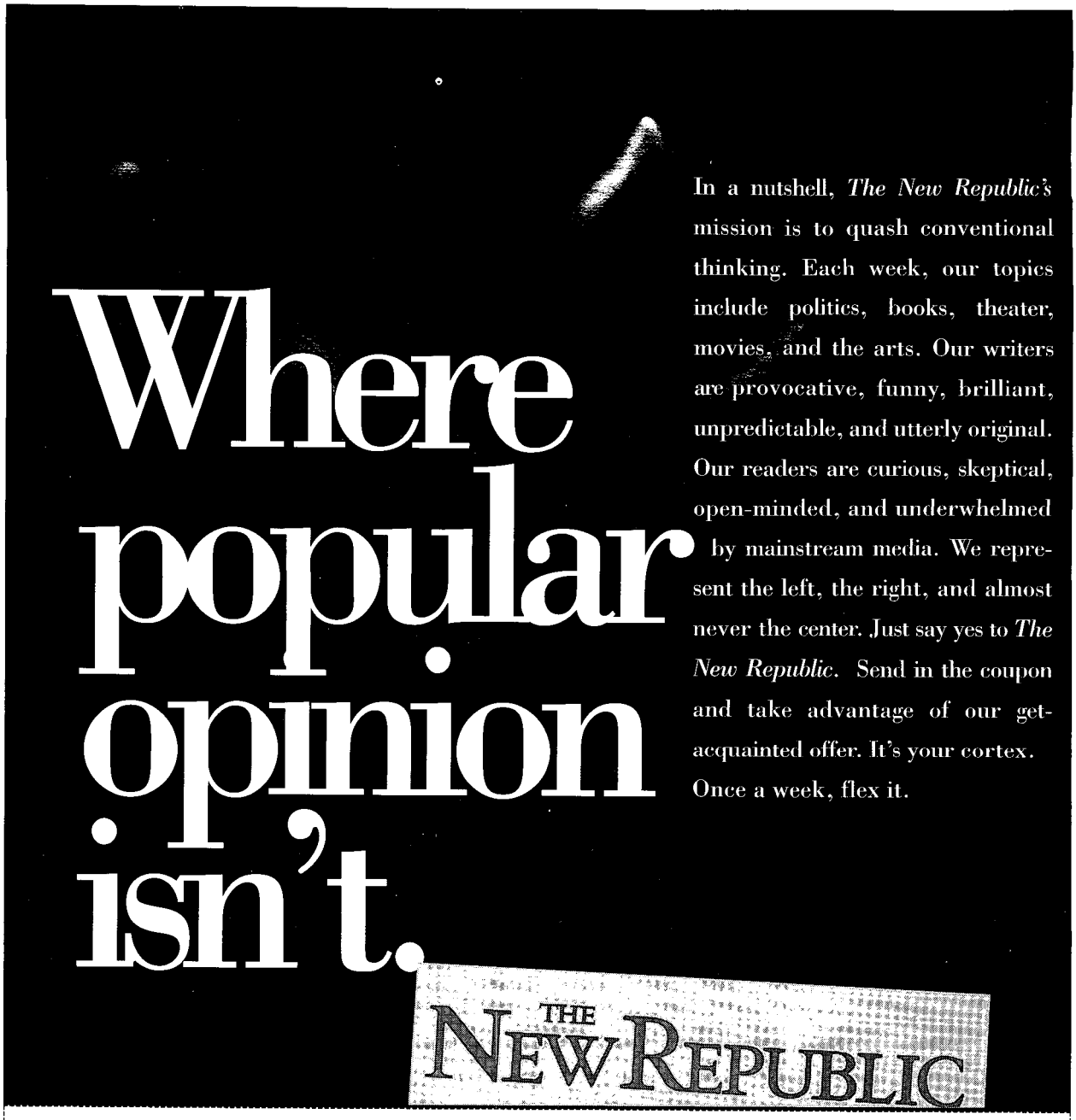

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Medical Convictions

How prosecutors are charging doctors with criminal malpractice—and why patients should be very scared

By Mark Crane

Eight years ago, Gerald Einaugler stood at the bedside of a terminally ill 78-year-old woman in a Brooklyn nursing home. The patient, who was suffering from kidney disease, had accidentally been fed through a tube intended for dialysis, but she was in stable condition. Einaugler, the nursing home's on-call physician, had no idea that he could be sent to prison for choosing to hospitalize her in the afternoon instead of in the morning.

But after the patient died in the hospital several days later, what Einaugler thought of as conservative management was portrayed by publicity-hungry prosecutors as intentional neglect. He was convicted and sentenced to 52 weekends at New York's notorious Riker's Island. He spent six weekends there, until Gov. George Pataki commuted his sentence last summer.

Einaugler's ordeal is a frightening example of what can happen when prosecutors seek trophies instead of justice. Nurses who destroyed clinical records to cover up their role in the case were granted immunity. The state's key witness recanted his testimony and now says Einaugler is innocent. The trial judge allowed prosecutors to inflame the jury with irrelevant, emotional rhetoric.

Although they felt powerless to overturn Einaugler's conviction because of limits imposed by recent Supreme Court decisions, two federal judges who reviewed the case said the outcome was unjust. "I would not have brought this case if I were prosecuting it," said U.S. District Judge Edward R. Korman in a conference with the attorneys. "If I had the power to set aside the verdict in the interests of justice, I would. But I am not a substitute for the jury system. Nor for a...prosecutor who is good at issuing press releases instead of preparing cases!"

A doctor's error in judgment is traditionally a civil matter, unless there is intent to cause harm or blatant indifference to a substantial, life-threatening risk. But indicting physicians and other health care professionals makes for attention-grabbing headlines, and in recent years prosecutors around the country have begun to blur the distinction between honest mistakes and crimes. The American Medical Association, which filed a friend-of-the-court brief on Einaugler's behalf, has passed resolutions decrying the trend. Criminalizing honest mistakes only drives them underground. In this punitive environment, there's strong incentive to hide errors rather than examine them, argues Nancy Dickey, the AMA's president-elect. "Every doctor should be afraid," says Donald Moy, general counsel of the Medical Society for the State of New York. Patients should be worried, too. The criminalization of medical judgment is bound to distort doctors' decisions, which increasingly will be guided by fear of prosecution instead of the patient's best interests.

Examples from other states show that Gerald Einaugler's experience is not unique:

■ In 1991, a Miami family physician was charged with manslaughter and "abuse of the elderly" after the death of a diabetic. Prosecutors sought an indictment based on an anonymous tip and a cursory investigation. An expert witness told the grand jury that the doctor's "neglect" caused the diabetic's death, but the expert later conceded that he'd read only a fraction of the patient's chart. After reading the full record, he recanted his testimony. It turned out the doctor hadn't even been in the state when the death occurred. While the indictment had been front-page news—the prosecutors called a press conference—the doctor's vindication was barely noticed. His 30-year career was destroyed. "Who wants a doctor who's been accused of homicide?" he asks.

■ Last year, three Colorado nurses were indicted for criminally negligent homicide when an infant died after being given penicillin. Due to a mixup, a pharmacist had dispensed a syringe containing 10 times the prescribed dose. The drug was supposed to be administered intramuscularly, but after consulting two drug reference books the nurses decided to give it intravenously, believing that would be less traumatic. Medication errors are common and can result in tragedies, but in this case it was hard to discern the callous disregard for life that is needed to justify a criminal pros-

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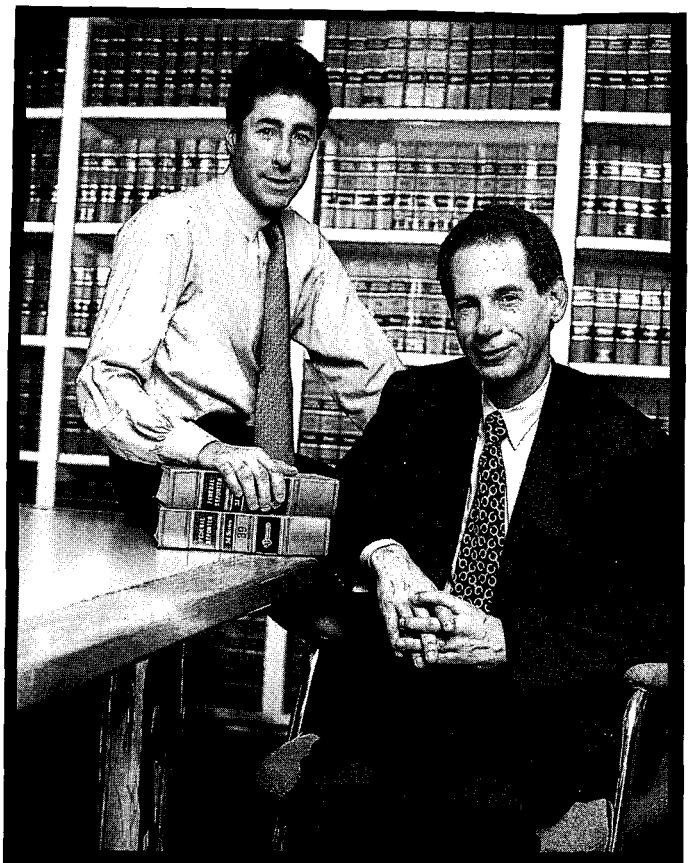


Physician Defend Thyself: Gerald Einaugler (right) and his lawyer, Peter A. Chavkin. All doctors should be accountable for their mistakes. But the distinction between honest errors and crimes must be based on a standard higher than a prosecutor's lust for publicity.

ecution. Two nurses agreed to plea bargains with no jail penalty. Criminal charges will be erased if there are no new "offenses" within the next two years. One nurse pleaded innocent and demanded a trial. A jury took 90 minutes to acquit her.

■ Also last year, five New Jersey nurses were indicted for endangering the life of a nursing home patient who was bleeding internally. They allegedly didn't contact an on-call physician until it was too late. Subsequent investigation revealed that the nurses did call and that they attempted to help the patient on their own. Their attorney says they were made scapegoats for staffing cuts at the county facility. After getting front-page headlines, the prosecutor caved in. He allowed the nurses to enter a program in which they avoided a trial and jail time without admitting guilt. All of them lost their jobs.

■ An emergency room physician in rural northern California faced murder charges because he allegedly failed to recognize the gravity of an infant's condition. The baby died of infection and dehydration. The doctor didn't intend to harm the child, but prosecutors argue that his errors were an extreme departure from appropriate care. The doctor's defenders say he was faced with a difficult clinical situation and used his best judgment. If he made a mistake, they say, the remedy lies with the civil courts, not a jail cell. Community leaders have raised thousands of dollars for the doctor's legal defense fund. After the prosecution rested its case in his trial, a judge dismissed the charges, acquitting the doctor. The judge said the evidence was insufficient to convict him of murder, involuntary manslaughter, or child endangerment. The physician still faces a civil malpractice suit from the child's family.

Physicians and nurses are inviting targets for ambitious prosecutors. Unfortunate outcomes, especially among patients in precarious health, happen despite the best of care. But prosecutors encourage jurors to reason backward and find a villain. By focusing on the outcome rather than the defendant's rationale at the time of treatment, prosecutors can persuade a jury to convict a health care professional who acted in good faith.

That's what happened to Gerald Einaugler, the only physician to be jailed (so far) because prosecutors playing doctor disagreed with his judgment. The case began on a Friday afternoon in May 1990 when a blind 78-year-old woman suffering from end-stage renal disease, cardiovascular disease, and other problems was transferred from Brooklyn's Interfaith Medical Center to a nursing home across the street. Einaugler handled the admission.

A catheter had been surgically implanted in the woman for peritoneal dialysis, in which blood is run through a machine that filters out waste products normally removed by the kidneys. Einaugler mistook the catheter for a gastrostomy tube and ordered liquid feedings through it. The hospital hadn't sent paperwork identifying the catheter or noting that the patient was to be fed by mouth. The state Office of Professional Medical Conduct concluded that the catheter's location near the abdomen and its resemblance to a feeding tube led to the error. Notably, the review board declined to impose any sanctions on Einaugler. Nor did he face a malpractice suit, though that could have been because the patient did not have any close relatives.

Einaugler was prosecuted not for the tube mistake but for delaying hospitalization after it was discovered. Nurses had been suspicious about the catheter, which did not have the right kind of end for a feeding tube. Instead of contacting Einaugler, however, they fiddled with it, snapping off the end and replacing it with a connector so that a bag of feeding solution could be attached. Thirty-six hours later, when they realized there'd been an error, they drained off most of the feeding solution, which had collected in the patient's abdominal cavity. The woman was in stable condition when the nurses called Einaugler at 6 a.m. that Sunday. Before leaving for the nursing home, he called her nephrologist, Irving Dunn, for guidance.

That conversation became crucial to the criminal trial. Prosecutors claimed Dunn had said immediate hospitalization was necessary. According to Einaugler, Dunn had advised him that there was no emergency, that the patient should be monitored until the next morning, when she would undergo dialysis and have her abdominal cavity washed out at the hospital. Einaugler examined the woman in the morning and the afternoon. A couple of hours later, when nurses said the woman seemed weaker, he ordered her transferred and met her in the hospital emergency room.

Now the patient was Dunn's responsibility. She didn't receive

PAULA EPSTEIN ROGOL

treatment until the next morning, when he performed dialysis. The patient died four days later. Of what, exactly, isn't clear. Although no autopsy was conducted, a city medical examiner testified three years later that the woman died of chemical peritonitis, a bacterial infection caused by foreign matter in the abdominal cavity—in this case, the feeding solution that was mistakenly administered through the catheter. The medical examiner never spoke to the woman's physicians or nurses, basing his conclusion on a review of the charts. Testimony by Einaugler's witnesses that the patient died of pneumonia and her other diseases was "far more persuasive," according to Korman, one of the federal judges who reviewed the case.

After the nursing home reported the catheter error to the New York Department of Health (as required by law), state prosecutors tried to indict Einaugler for manslaughter. Edward J. Kuriansky, then the lead state prosecutor for nursing home cases and now New York City's investigations commissioner, charged that Einaugler, attempting to cover up his mistake, had ignored Dunn's advice to transfer the patient immediately. "After Einaugler's grossly negligent conduct placed the patient in mortal danger," he wrote in a letter to *The Wall Street Journal*, "he prevented the treatment which he knew was necessary. His disregard of another human being was so reckless and so neglectful as to render him criminally liable."

Instead of manslaughter, a grand jury indicted Einaugler on two misdemeanor counts of reckless endangerment and neglect. But Kuriansky, who issued press releases after the indictment and after the conviction, continued to make public statements blaming Einaugler for causing the patient's death, an offense with which he was not charged. Einaugler turned down a plea bargain that would have resulted in no jail time. "How could I plead guilty when I didn't commit any crime?" he asks.

Dunn, the key prosecution witness at the 1993 trial, gave testimony that was ambiguous and hard to follow. Appeals court judges later disagreed about what he meant. He conceded that the situation on Sunday morning was not an emergency, but he said the need to hospitalize the patient was urgent, and he denied telling Einaugler that it could wait until Monday. On appeal, several judges said a jury could reasonably conclude that Dunn had conveyed the need for immediate transfer, even though his instructions were not explicit.

For a century, New York courts have required expert testimony before a civil malpractice case can go to a jury. One might think such testimony would be more important in a criminal case. But the appeals court ruled that expert testimony isn't necessary under the reckless endangerment statute.

Peter A. Chavkin, the attorney who began representing Einaugler after the trial, says testimony about the patient's death prejudiced the jury. "Prosecutors intimated that Einaugler had caused her death, even though he wasn't charged with that," he says. "It became impossible to overcome the jury's desire to punish someone."

Judge Neil J. Firetog sentenced Einaugler, a first-time offender, to 52 weekends in prison—a harsher penalty than muggers often get. The sentence was stayed pending the doctor's appeals, which lasted almost four years.

Korman, the U.S. district judge, reluctantly upheld the conviction, but he challenged Dunn's veracity and blasted prosecutors and Firetog for bungling the trial. "It makes absolutely no sense that Einaugler would seek Dunn's advice only to ignore it," Korman noted, concluding that Dunn had been "less than truthful." Still, a witness's credibility is for the jury to determine. Though Korman found the case deeply troubling, he noted that Supreme Court decisions on habeas corpus review limited his authority to set aside an unjust verdict. "I hope I get reversed," he said in a conference with the attorneys. "Habeas law is a procedural morass. The one thing that everybody has succeeded in doing is making innocence irrelevant."

A divided federal appeals court also upheld the conviction, even though there was no expert testimony that the alleged delay in hospitalization posed a substantial danger to the patient. (Einaugler's expert witnesses, including the renowned medical examiner Michael Baden, testified that there was no such danger.) For a century, New York courts have required expert testimony before a civil malpractice case can go to a jury. One might think such testimony would be even more important in a criminal case. But the appeals court ruled that expert testimony isn't necessary under the reckless endangerment statute. In a scathing dissent, one judge said this means a physician can be jailed based on evidence that isn't strong enough to get him sued. He also likened the prosecution's cover-up theory to an Oliver Stone screenplay.

After Korman's decision in March 1996, Dunn signed an affidavit to "clarify" his testimony. He now recalled saying that hospitalization on Sunday wasn't necessary. He said Einaugler had acted responsibly. Last year, as Einaugler was about to enter prison, Dunn went even further. He told me that prosecutors were out to get Einaugler from the start. "He's completely innocent," Dunn said. "He sought my advice and followed my instructions exactly. There was no emergency. I asked him to monitor the patient at the nursing home, which he did."

What accounts for Dunn's about-face? He was under tremendous pressure from prosecutors at the trial and probably worried that they might bring charges against him. But when he saw that Einaugler was going to prison, he could no longer stick to his initial story.

With Dunn's permission, I recorded our conversation and gave the tape to Chavkin, Einaugler's attorney. Chavkin presented it, along with the Dunn affidavit, as newly discovered evidence, seeking a new trial. Firetog, the trial judge, ruled that the new evidence was not substantial enough to have altered the outcome, and his decision was upheld by the state appeals court. Because of a statutory limit on the number of habeas corpus petitions a defendant can file, the federal courts refused to acknowledge the new evidence. As Korman noted, innocence is irrelevant.

Einaugler got strong support from his colleagues and from organized medicine. They pleaded with Pataki to intervene in the case. "We won't risk our reputation going to bat for bad apples," says Morton Kurtz, former president of the New York medical society. "We had 57 physicians review the charts and trial transcript. Einaugler didn't neglect his patient and didn't cover anything up. He made a judgment to treat her conservatively. If a prosecutor can charge, in hindsight, that conservative treatment is neglect, then every physician is vulnerable to an aggressive prosecutor looking for a headline."

After Einaugler spent six weekends at Riker's Island, Pataki freed him, commuting his sentence to community service, consisting of treating patients at a homeless shelter. It's telling that the governor said Einaugler's service should be "as a physician." It's doubtful he would demand that if he thought Einaugler had neglected or endangered his patient.

In his own practice, Einaugler treats a few loyal patients, mostly for free. Because of his conviction, he was disqualified as a Medicare and Medicaid provider and lost his hospital and nursing home privileges. No health plan will touch a doctor who's been convicted of a crime. Einaugler is facing financial ruin. Chavkin and his law firm, Stillman and Friedman, have represented him pro bono for years, providing more than $450,000 worth of legal services. "Governor Pataki showed tremendous courage in reviewing this case and commuting the sentence," says Chavkin. "But as long as the conviction stands, Jerry Einaugler can't earn a living and has a stain on his name. We're still seeking a new trial, and requesting a full pardon from the governor."

The precedent set by the Einaugler case is dangerous because it means that physicians are at the mercy of any overzealous prosecutor trying to make a name for himself. The state will decide after the fact which clinical judgments should be punished.

The precedent set by the Einaugler case is dangerous because it means that physicians are at the mercy of any overzealous prosecutor trying to make a name for himself. Predictability is fundamental to the rule of law. A law may be stupid or cruel, but if you know in advance what's legal and what isn't, you can decide whether to cross the line. If this verdict stands and other prosecutors take a cue from the case, doctors will no longer have that fundamental protection. The state will decide after the fact which clinical judgments should be punished.

As unfair as that is for physicians, the implications are more ominous for patients. Malpractice litigation already encourages extra tests and procedures, driving up health care costs and posing unnecessary risks to patients. The threat of prosecution compounds the tendency to make decisions based on legal concerns instead of sound medicine. How can a patient rely on a doctor who's worried that his best advice could land him in prison?

Unwarranted prosecutions may encourage doctors to be dangerously aggressive or dangerously cautious. If monitoring a patient rather than hospitalizing her is criminal neglect, what doctor wouldn't call for the ambulance at the first sign of trouble? Given the risks that transfers pose to the frail elderly, such incentives could easily do more harm than good. Prudent physicians may even shun difficult cases, making it more difficult for the very sick to receive treatment.

The problem goes beyond the elderly. It's not uncommon for an obstetrician to tell a patient in the early stages of labor to wait at home for a few hours before going to the hospital. Like any human being, he could be wrong. If the patient or her child is injured, he might be sued or hauled before a professional board. That's part of the uncertainty of medicine. But what happens if his good-faith decision is prosecuted as criminal neglect? Once obstetricians realize their risk, pregnant women may be hospitalized at the first sign of labor, whether or not it's clinically indicated.

Or consider appendicitis, which is often difficult to diagnose. Since surgery and anesthesia always carry risks, we don't want doctors to start cutting up everyone with a bellyache. It's not unusual for doctors to take a "wait and watch" approach, and sometimes they wait too long. If the appendix bursts, the patient could get peritonitis, which is potentially fatal. In such a case, a patient or his family might sue for malpractice. They'll get an award only if they can prove that the physician's actions deviated from the accepted standard of care. But with the added threat of criminal charges, physicians might be more inclined to perform exploratory surgery rather than wait.

Breast cancer raises similar issues. When women have lumps, physical exams and mammograms are often equivocal. Based on the patient's history and his own clinical experience, a physician might say, "I think it's a cyst, not a tumor. Come back for another exam and mammogram in six months." Physicians already know they can be sued if a patient decides that her breast cancer should have been diagnosed sooner. But what would happen if prosecutors began charging such doctors with criminal neglect? More biopsies would be performed, causing needless fear, pain, and disfigurement.

As these scenarios suggest, the option that is least likely to attract a prosecutor's attention is not necessarily the one that's best for the patient. And while cases such as Einaugler's are still unusual, that fact makes them even harder to predict. Physicians can't know what conduct is illegal until the mug shots are taken.

Medicine is often as much art as science, and competent physicians disagree all the time. But prosecutors paint cases as black and white. If there's an unhappy result, a jury is asked to punish the bad guy. No doctor should be immune from paying for mistakes. But the distinction between honest errors and crimes must be based on a standard higher than a prosecutor's lust for publicity. Physicians should be allowed to practice without the threat of criminal liability lurking behind every decision. ◆

Mark Crane (mark_crane@medec.com) is a senior editor at Medical Economics *magazine.*

Still Crazy

Are federal judges taming the ADA? Don't count on it.

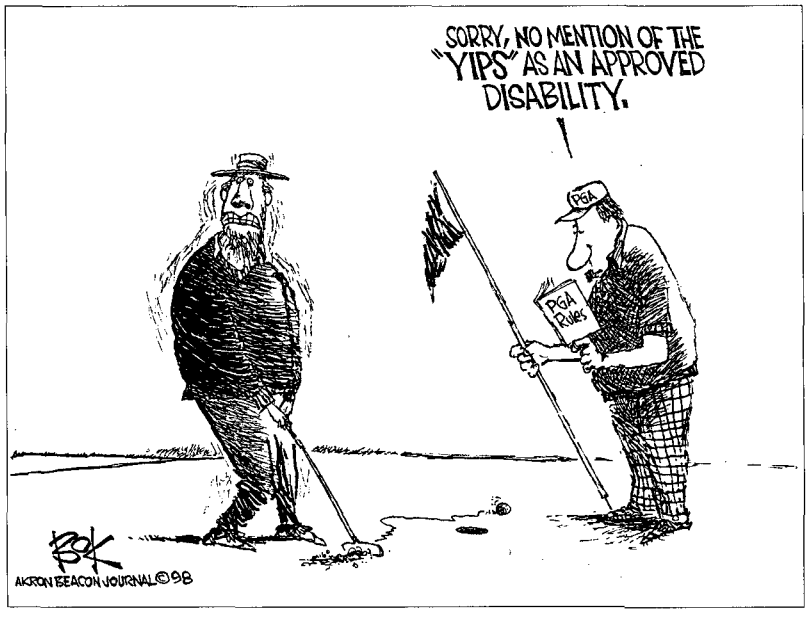
By Walter Olson

So now we find out: The Americans with Disabilities Act of 1990 empowers federal judges to rewrite the rules of golf, after deciding that the right to play in the elite PGA Tour is a "public accommodation" like the chance to patronize a lunch counter or motel. It's hard to see a reason in principle why enfeebled base runners now shouldn't ask for motorized buggies to help in their attempts to steal third, or why slow pawn pushers shouldn't get double time on the tournament chess clock if they bring in a note saying they're learning disabled. College applicants already get double time on the SATs that way, after all. Every Olympics a Special Olympics!

A parade of revered pros from Jack Nicklaus and Arnold Palmer on down had testified that walking and its associated fatigue, sometimes across steep terrain under a broiling sun, is intrinsic to the game of golf, and that in any case the sport deserved the right to set its own rules. No matter: To Oregon federal magistrate Thomas Coffin, the more relevant factor was that local hopeful Casey Martin, even with a cart to accommodate his leg disability, will still be expending more energy and getting more winded than his able-bodied competitors. With the point of pro sports now redefined as credit for effort rather than actual performance, the track and field people might just as well give up and proceed directly to installing the high-jump ramps.

Last year, ADA backers had been put on the defensive by the public's incredulous reaction to the new Equal Employment Opportunity Commission guidelines on mental illness in the workplace. The plucky Martin was a more sympathetic figure, personally liked even by many fans who thought his legal campaign was a disaster. And yet the victory against the PGA also undercut a theme that the disabled-rights forces had been assiduously cultivating over the past year. No matter how extreme the ADA might sound as a venture into social engineering, they insisted that in practice the federal judiciary was interpreting it so cautiously and narrowly that no one should take alarm. Thus the *Los Angeles Times* suggested that "the broad protection promised by the ADA has been unfulfilled because of the narrow way that judges and employers have interpreted the law." "Judges are holding plaintiffs up front to a very high standard," nods David Fram of the National Employment Law Institute.

Sorry, but no dice. Sure, case reports include plenty of ADA claims that lose, and many courts have indeed applied relatively narrow interpretations. But the backers of super-expansive ADA interpretation—which include the EEOC and Justice Department, most academic commentators, and the usual array of activist litigators—have also been winning cases of their own. Moreover, there's no symmetry between noteworthy defendant wins—which are often hard to marshal as precedent that provides any real safe harbor for future practice—and noteworthy plaintiff wins, which, as in the PGA Tour case, can open up huge virgin fields for future litigation. Given that the U.S. Supreme Court has declined to address the tangle of inconsistent lower-court rulings, no well-advised employer or business should behave as if its exposure under this law is anything other than open-ended, unpredictable, and highly dangerous.



CHIP BOK

Last September *U.S. News & World Report* published in its "News You Can Use" department a remarkable little piece asserting that, widespread opinion notwithstanding, "managers have little reason to fear being sued" under employment law. To back up this contrarian (at the least) view, it cited ADA case law: "Recent court rulings have actually made it tougher for employees to claim discrimination by narrowing the definition of who is protected....Courts have found, for example, that if an employee's mental illness is controlled through medication or his or her hearing is improved by a hearing aid, then the person is not disabled under the law."

How accurate is that statement? Yes, some courts have ruled correctable disabilities aren't covered by the law. But other courts, of equal authority, have ruled the opposite. Thus in June of last year, a federal judge in Washington declared an IRS agent with vision problems to be legally disabled and thus covered by the act even though corrective lenses gave her 20/

20 vision. On September 2, not long before the *U.S. News* article went to press, the 6th Circuit ruled that Kevin Gilday of Mecosta County, Michigan, who suffered from treatable but in fact untreated diabetes, was covered by the ADA. Gilday had been fired from his paramedic job for rudeness toward patients and colleagues that he claimed stemmed from mood swings caused by his diabetes.

Or consider the issue of whether workers can be held to a consistent standard on the issue of whether they're too disabled to work. In the 1996 case *McNemar v. Disney Store*, the 3rd Circuit ruled that a claimant who'd applied for and obtained Social Security benefits based on a certification of being completely disabled and wholly unable to work could not then turn around and sue a private employer which had agreed with the Social Security people that he wasn't up to a job. Disabled advocates greeted the *McNemar* decision with peals of outrage—those dreadful conservative courts were at it again. If any employers were so rash as to rely on *McNemar* as precedent, they were soon given pause. Last summer, in a pair of cases written by Judge David Tatel, the D.C. Circuit came out the other way, seeing no problem in simultaneously accepting benefits based on 100 percent disability and claiming fitness for work as grounds to sue someone who refused you a job.

Or consider lawsuits demanding extra time on tests and other perks for the learning disabled. Some early cases suggested judicial skepticism, but by last summer the ADA triumphalists saw the tide beginning to turn: A New York woman who had flunked the bar exam five times won a federal court order that she be given double time and other accommodations, while in another case learning-disabled students gained a partial court success against resistant officials at Boston University, enough to let their lawyers claim victory.

Not as far along toward judicial acceptance—yet—are complaints that employers have failed to accommodate diagnoses of multiple chemical sensitivity by protecting workers from the smells of new carpets, co-workers' perfumes and shampoos, copier toner, cleaning fluids, and so forth. (See "Sick of it All," June 1996.) Yet, as *The New York Times* reported in February, MCS patients are increasingly meeting with success in pursuing workers' compensation claims over their condition. Only a brave employer will dismiss the prospect that some employee down the road will parlay such a determination into an official finding of ADA coverage. The lesson, again: When in doubt accommodate, even if the demands tie the office in knots.

Other ADA shocks seem to come every few weeks. One came recently when a federal court ruled that infertility would henceforth count as a disability, magically establishing a new requirement that employer health plans cover *in vitro* fertilization and other expensive treatments—and retroactively, too, since it may now be possible to demand that employers foot the bill for expenses paid privately years ago for therapies that can cost tens of thousands of dollars per couple.

Indeed, the EEOC has tended to take a harsh line toward employers who rely in good faith on court decisions that are later overturned or modified. In a 1988 Chicago case, a lower court ruling had seemed to establish that it did not violate federal discrimination law for an employer to grant certain maternity benefits to its female workers but not to male workers whose wives gave birth. The owners of one small business, acting in part on the basis of that ruling, paid the benefits only to the women on its staff. When the court decision was later overturned, the EEOC demanded retroactive payments for the male employees, and backed up its view by going after the owners for damages personally (they had gotten out of the business in the meantime). The oppressive outcome, upheld by the 7th Circuit, was to haul the owners out of retirement to face a bill for back fines and damages.

Like pounding waves that gradually erode a shoreline, the EEOC's own staff, activist litigators, and liberal law professors keep advancing the aggressive readings and extreme interpretations of the ADA that many of today's courts may not be ready to adopt. Thus the EEOC is currently suing United Parcel Service over its policy of refusing to hire truck drivers who have vision in only one eye. No one really knows whether they'll win or lose. And yet it's rather paradoxical for these same enforcers and activists to cite the courts' hesitance about accepting such claims (yet) as if it were some saving feature of the system, an infusion of much-needed common sense. It's as if they're saying: "Oh, pipe down, we'll probably lose."

In February former Rep. Tony Coelho, a prominent ADA sponsor who now heads the President's Commission on Employment of People with Disabilities, appeared on *Crossfire* to cheer the Martin decision and the ADA in general. (I was tapped to take the opposite side.) "It was deliberately written vaguely," he announced of the law, openly contradicting such other defenders as Janet Reno, former Attorney General Dick Thornburgh, and law professor Walter J. Kendall III, all of whom have claimed in print that the ADA is "clear." Perhaps Coelho's most curious argumentative gambit was to suggest that if employers are spending fortunes on ADA compliance it's their own fault: They've been snookered, he says, by "Rolls-Royce" consultants who push expensive compliance methods when inexpensive ones are available.

And yet it wasn't some consultant who proclaimed that disabled workers may have a right to personal assistants and one-on-one "job coaches"; it was the EEOC itself. It wasn't a consultant who ordered medical boards (and by extension hospitals) to stop inquiring into doctors' histories of mental illness, alcoholism, or addiction to drugs found in hospital dispensaries; it was a federal judge in New Jersey. It wasn't a consultant, of the Rolls-Royce or even the Hyundai variety, who announced that a small company might be legally obliged to foot the bill for the supervisor of a deaf job applicant to go off and take courses in sign language so the two could communicate; it was *The New York Times*, in a front-page article in July 1992. And it wasn't a consultant who ruled that violence, belligerence, and theft on the job could signal protected disability; it was federal courts in Florida, Maine, and other states.

It's not a Rolls-Royce of a law, or a hole-in-one either. It's a train wreck and a sand trap.

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What's wrong with libertarianism...

...And how to fix it

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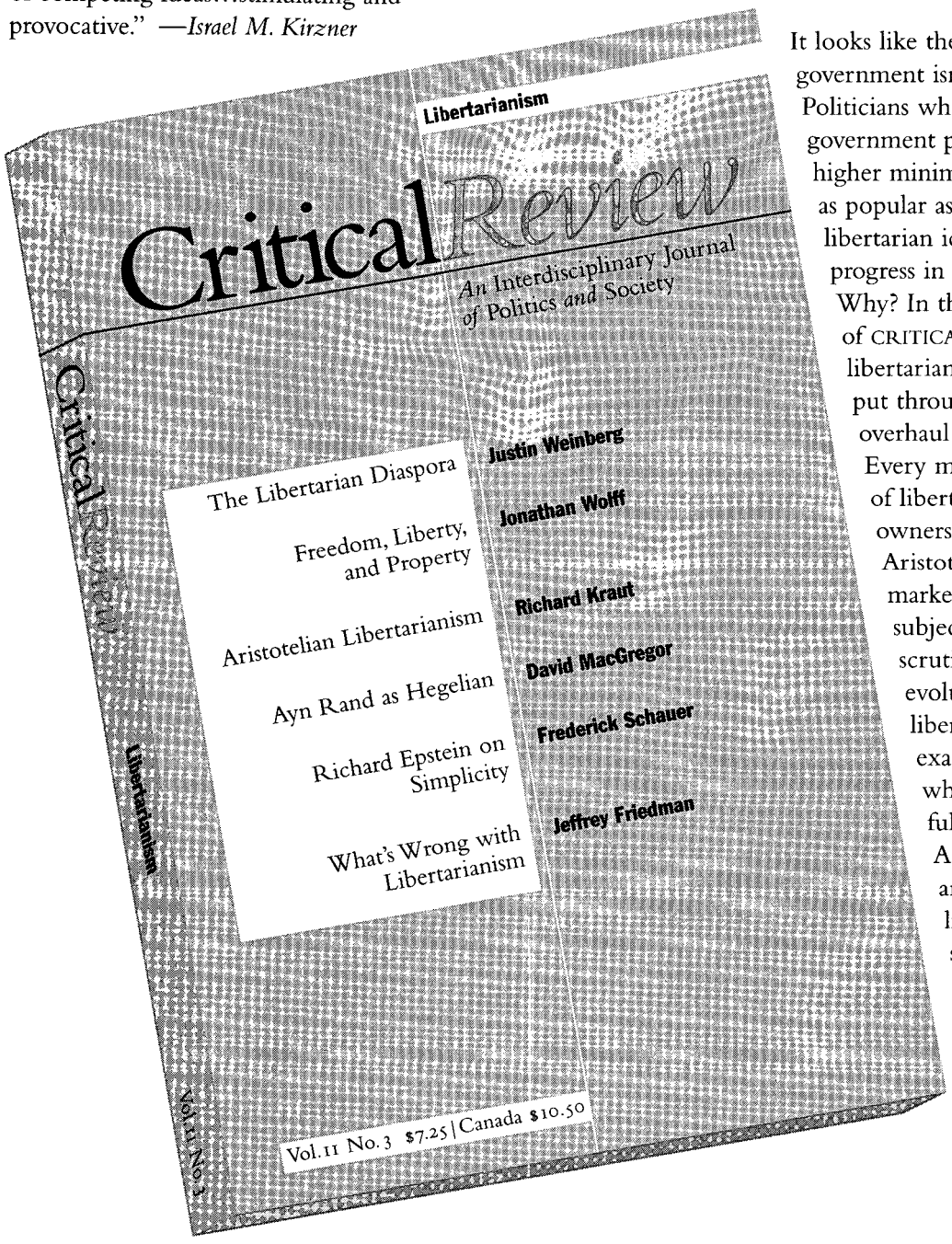

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The Fire Last Time

By Jacob Sullum

Waco: The Rules of Engagement, directed by William Gazecki, Fifth Estate Productions, 136 minutes, $25.00

No More Wacos: What's Wrong with Federal Law Enforcement and How to Fix It, by David B. Kopel and Paul H. Blackman, Amherst, N.Y.: Prometheus Books, 524 pages, $26.95

During the 1995 congressional hearings on Waco, Rep. Tom Lantos (D-Calif.) was mystified that "the lunatic fringe still clings to the notion that there was a gigantic government conspiracy that brought about this nightmare." He said "it is difficult to see how any rational human being subscribes to such a notion." But as you examine the details of what happened at Waco and what government officials said about it, the tendency to see a conspiracy is not so hard to understand.

The bald-faced lies highlighted in *Waco: The Rules of Engagement*, William Gazecki's critically acclaimed documentary, leave you shaking your head. The catalog of incompetence, arrogance, ignorance, recklessness, dishonesty, and moral obtuseness in *No More Wacos*, David B. Kopel and Paul Blackman's comprehensive account of the disaster, is overwhelming. In many ways, it is easier to believe that the whole thing was planned by a few evil men at the top than to think that it unfolded haphazardly, without rhyme or reason.

But the most troubling thing about Waco, the deadliest law enforcement operation in U.S. history, is the absence of a grand conspiracy. As Kopel and Blackman show, the investigation of the Branch Davidians by the Bureau of Alcohol, Tobacco, and Firearms, the BATF's February 1993 raid on Mount Carmel, the 51-day FBI siege, the April 19 assault that led to the final fire, the trial of the survivors, and the subsequent explanations can all be understood in terms of prevalent prejudices and familiar failings. Hostility toward private gun ownership and unconventional religions played an important role in the government's actions against the Davidians and in the public's indifference to their fate. Another conspicuous factor was the tendency for overconfident people to screw up, dodge responsibility afterward, and rationalize their behavior as justified by some greater good. As scary as it is to contemplate, it's doubtful that anyone involved in this shameful episode felt in his heart that he was doing wrong.

At the same time, to blame the deaths of 86 men, women, and children (including four BATF agents) on a series of errors does not do justice to the government's conduct at Waco, which rose at least to the level of negligent homicide, or to the cowardly cover-up that followed. And to blame the dead themselves is audacious, since all would be alive today but for the government's gratuitous use of force. Yet Sen. Joe Biden (D-Del.), who makes an appearance toward the end of *Waco: The Rules of Engagement*, managed to do both. "The record of the Waco incident documents mistakes," he said. "The record from Waco does not evidence, however, improper motive or intent on the part of law enforcement. David Koresh and the Davidians set fire to themselves and committed suicide. The government did not do that."

Five years after Mount Carmel went up in flames, the view that the Branch Davidians did it to themselves—which is also the position taken by President Clinton and Attorney General Janet Reno—remains quite popular. But as Rep. Lantos might say, it is difficult to see how any rational human being subscribes to such a notion. If you know an otherwise decent and reasonable person who still believes the Davidians basically had it coming, show him *Waco: The Rules of Engagement*, which had a limited theater run and is now available from Amazon.com and Laissez Faire Books.

The documentary, which was nominated for an Academy Award, is powerful enough to appall people who have followed the story closely. Judging from the positive reviews in publications not known for their pro-gun or pro-religious sympathies (*The New Republic*, *The New York Times*, the *Boston Globe*), it has an even stronger impact on people who have not given Waco much thought. Director William Gazecki and his co-writers, Michael McNulty and Dan Gifford, skillfully weave together excerpts from the congressional hearings, press conferences, and negotiation tapes; interviews with witnesses, experts, and local officials; and images of Mount Carmel before, during, and after the siege. Their approach is calm and matter-of-fact, but their juxtaposition of official statements with reality is devastating.

Once you get your friend's attention with the movie, give him *No More Wacos*, which meticulously documents and analyzes what went wrong and suggests specific reforms to rein in federal law enforcement. The book, which won last year's Szasz Award from the Center for Independent Thought, relies exclusively on material already in the public record. But Kopel, research director at the Colorado-based Independence Institute, and Blackman, research coordinator for the National Rifle Association's Institute for Legislative Action, put it all together in one coherent narrative, with appendices detailing the legal changes they recommend, laying out the chronology, identifying the important figures, and summarizing the negotiation tapes. Their thoroughness makes the book a very useful reference.

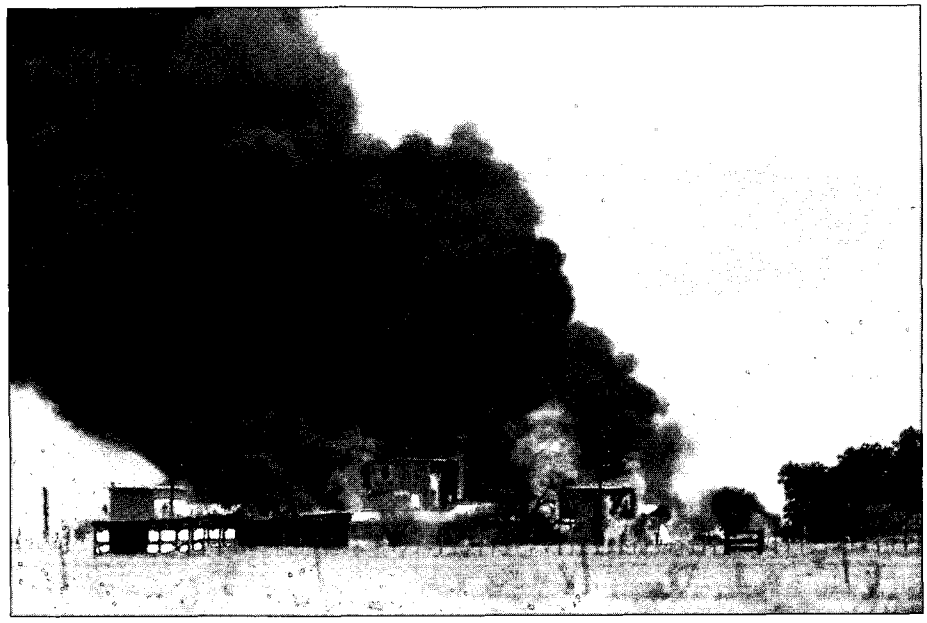
The most startling revelation in *Waco: The Rules of Engagement* is that government personnel apparently fired automatic weapons into Mount Carmel during the FBI's assault, deterring the Davidians from escaping the deathtrap their home had become. Two professional analyses of infrared footage shot by a government plane during the assault identified several instances of machine-gun fire coming from the outside. As the movie re-

minds us, the FBI repeatedly bragged that it did not fire a single round at Waco—an assertion that was not challenged during the congressional hearings.

Kopel and Blackman complain, with justification, that the hearings degenerated into a partisan battle, with Republicans trying to pin the blame on Clinton appointees, even though the BATF investigation began under the Bush administration and "almost everything that went wrong at Waco...was the result of acts by career federal employees." But Gazecki's film shows that the Republicans were not the only ones who were willing to obscure the truth for the sake of political advantage. Rep. Charles Schumer (D-N.Y.), for example, clearly saw his job as denying that the government bore any responsibility for what happened to the Davidians.

In one illustrative exchange, Schumer asked Dick DeGuerin, one of Koresh's lawyers, if it was true that the Davidians were stockpiling grenades. DeGuerin said the only grenades he had seen at Mount Carmel were the ones BATF agents tossed in during their raid. A startled Schumer insisted that the "flashbang" grenades used by the BATF—which create a bright flash and a loud noise to distract and disorient the enemy—are not *really* grenades. Later he contemptuously dismissed DeGuerin's testimony: "Mr. DeGuerin said flashbangers can kill, injure, maim. Anyone who knows anything about these things knows they can't." But it was Schumer who didn't know what he was talking about: As Rep. Bob Barr (R-Ga.) noted, flashbangs are classified as "destructive devices" under federal law, and in response to Barr's questioning a BATF agent conceded that they can kill at close range.

Schumer's underlying message—that the BATF had acted with restraint during the raid—is equally absurd. As *Waco: The Rules of Engagement* shows, the agents fired wildly into the thin-walled building, heedless of the women, children, and unarmed men within. Wayne Martin, one of the Davidians, made a panicked 911 call during the attack, trying to find someone who could stop the shooting. If anyone held back during the raid, it was the Davidians, who knew the BATF was coming and easily could have killed almost all of the 76 agents as they arrived at Mount Carmel in cattle trailers.



AP / WIDE WORLD PHOTOS

Public Burning: Eighty-six men, women, and children (including four BATF agents) died at Waco. A jury rejected murder charges against 11 surviving Branch Davidians, apparently concluding they had acted in self-defense. The forewoman said, "The federal government was absolutely out of control there. We spoke in the jury room about the fact that the wrong people were on trial."

"Is there any way that somebody could believe that justifiable homicide could be used as a defense here?" Schumer incredulously asked during the hearings. Well, yes. Under common law, you are entitled to resist excessive force by government agents, even when they have a valid search warrant (and as Kopel and Blackman detail, the warrant in this case, which alleged that Koresh and a few other residents had illegally produced machine guns and hand grenades, was marred by errors, false statements, stale information, unreliable sources, and inflammatory charges of child abuse that had nothing to do with the search). A jury rejected murder charges against 11 surviving Davidians, apparently concluding that they had acted in self-defense. The forewoman summed up the jury's view this way: "The federal government was absolutely out of control there. We spoke in the jury room about the fact that the wrong people were on trial, that it should have been the ones that planned the raid and orchestrated it and insisted on carrying out this plan."

Neither the book nor the movie answers the important question of who fired first. That issue may never be resolved satisfactorily, given the amount of evidence that has been destroyed or suppressed. The missing evidence suggests some rather ham-handed efforts to hide the truth, so obviously fishy that they actually count against the idea of a sophisticated conspiracy. *Waco: The Rules of Engagement* includes congressional testimony by a combat expert who said the BATF's failure to anticipate that the raid might not go off as expected amounted to an "'Oh, shit' contingency plan." Much the same could be said of the cover-up.

The BATF initially claimed that an official videotape of the raid would show the Davidians started the shootout; then it said the tape was inexplicably blank. The bureau aborted its own investigation of the raid when the Justice Department started worrying that interviews with the agents who had been at the scene would produce contradictory accounts or other material that could be useful in defending the surviving Davidians—evidence that the prosecution would be legally obliged to share. We know this because a Treasury Department official explicitly said so in a memo.

And then there is the notorious steel door. The BATF claimed the shootout started when the Davidians fired a fusillade through the front door of Mount Carmel. But one of Koresh's lawyers, Jack Zimmerman, said he had examined the door, and almost all of the holes puckered in-

ward. The door itself, which presumably could resolve this dispute, survived the fire and promptly vanished. During a recent debate with Kopel at NYU Law School, Ron Noble, who oversaw the Treasury Department's report on Waco, seemed sincerely exasperated by this little mystery: "Where's the door? I wish I knew. It stinks of a cover-up."

The other major issue that remains unresolved is who started the fire at the end of the FBI siege. Both the book and the movie note that the blaze did not start until five or six hours after an FBI bug in Mount Carmel recorded a conversation about spreading fuel, usually taken to be evidence that the Davidians deliberately set the fire. During this time, the FBI was knocking into the building with tanks, which closed off escape routes and created vents that made the fire spread more quickly. The tanks pumped in an aerosol consisting of CS powder, a chemical warfare agent that causes tearing, temporary blindness, nausea, and vomiting, and methylene chloride, a toxic and volatile carrier that forms flammable mixtures when exposed to the air. The FBI also shot the powder into the building in cannisters. It later insisted that it did not fire any incendiary rounds, but two were recovered from the site. Whoever actually ignited the fire, the FBI clearly made it more deadly.

What the FBI admitted about its tactics may be just as horrifying as what it denied. *Waco: The Rules of Engagement* shows a bureau spokesman explaining that the idea behind filling Mount Carmel with CS was to torture the children (who had no gas masks) until their parents surrendered. "We thought that their instincts, their motherly instincts, would take place and that they would want their children out of that environment," he said. "It appears that they don't care that much about their children, which is unfortunate." According to experts cited in the book and quoted in the movie, the CS powder probably incapacitated Davidians who otherwise might have fled and may even have killed some of them. The powder can be fatal in high doses, and it turns into cyanide when burned.

If Koresh did order the fire, then obviously he and his accomplices bear much of the responsibility for the ensuing deaths. In any case, he and several other Davidians died of gunshot wounds they apparently inflicted on each other to avoid surrendering or dying in the fire. But, as Kopel and Blackman note, "the government gave David Koresh unnecessary help in his misguided quest for martyrdom."

In the movie, Clive Doyle, one of the surviving Davidians, asks a good question: "If they thought that we were all brainwashed and such a bunch of crazies, why would the FBI push David and the rest of us to the limit?" The movie and the book document the FBI's many gratuitous acts of provocation: shining bright lights and blaring obnoxious sounds (including Nancy Sinatra singing "These Boots Are Made for Walking") to prevent the Davidians from sleeping, destroying cars and children's go-carts, mooning the women and giving them the finger, deliberately and repeatedly running over a Davidian's grave with a tank. Despite this harassment, note Kopel and Blackman, the FBI negotiators tried to reassure the Davidians that the government wanted a peaceful resolution, saying, "nobody's going to run tanks through buildings that contain people" and "the last thing that's going to happen is for the government to take any kind of offensive action....You know, we don't hurt babies. You know, we don't hurt women. We don't do those types of things."

What the FBI admitted about its tactics may be just as horrifying as what it denied. *Waco: The Rules of Engagement* shows a bureau spokesman explaining that the idea behind filling Mount Carmel with CS gas was to torture the children (who had no gas masks) until their parents surrendered.

And yet they did. In the documentary, Alan Stone, the Harvard professor of psychiatry and law who reviewed the Justice Department's report on Waco, tells an interviewer: "When I was first asked to be involved as a member of the panel, I thought the main problem was going to be understanding the psychology of the people inside the compound. But as I got into it, I quickly became aware that the psychology of the people outside the compound was more important."

The men who confronted the Davidians were angry, tired, and frustrated. They did not understand this weird "cult" and did not care to. They saw the people who lived at Mount Carmel as mindless drones under Koresh's control, when in fact the Davidians included many intelligent, well-educated people, who were attracted by Koresh's religious message rather than his personal charisma (of which he had little). In *Waco: The Rules of Engagement*, the surviving Davidians come across as rational and articulate, especially in comparison to raving demagogues like Rep. Schumer. "I liked them," says the local sheriff, Jack Harwell, who describes the Davidians as "good people"—courteous, well-groomed, unassuming. But the FBI did not want the public to sympathize with the Davidians, so it kept the press at a distance and held back a videotape shot inside Mount Carmel during the siege, which showed not crazed cultists but apparently normal, decent folks with strong religious beliefs. Had Americans seen the Davidians in this light, surely their response to the government's actions would have been outrage rather than applause.

Dehumanizing the enemy is a part of a military mind-set, and one of Kopel and Blackman's main themes is the need to sharpen the distinction between soldiers and peace officers. They recommend a series of reforms aimed at demilitarizing federal law enforcement, from getting rid of black, Ninja-style uniforms to eliminating collaboration with the National Guard and Pentagon. They note that the police function has been militarized largely as a result of the war on drugs—a fact reflected at Waco, where the BATF obtained military training and support by falsely claiming that the Davidians were manufacturing methamphetamine. The drug war has also been the excuse for

Supreme Court decisions undermining Fourth Amendment rights, creating a legal environment conducive to poorly justified, overreaching search and seizure operations like the BATF's raid on the Davidians. Kopel and Blackman call upon Congress to roll back this erosion of civil liberties with legislation.

No More Wacos proposes many sensible reforms, including stricter rules for obtaining warrants, remedies for victims of unreasonable searches, training for federal agents in religious and constitutional sensitivity, and a requirement for Cabinet-level approval of large raids. But while these changes would help reduce abuses of federal power, Kopel and Blackman recognize that the ultimate solution is to reduce federal power itself. Given the way things turned out, it's easy to forget that the chain of events leading to the incineration of Mount Carmel was set in motion because the BATF could not stand idly by knowing that some people in Texas might possess illegal machine guns. Yet even leaving aside the Second Amendment (which congressional investigators were eager to do), nothing in the Constitution authorizes the federal government to forbid intrastate possession of particular firearms (or drugs, for that matter).

If the federal government exercised only those powers actually granted by the Constitution, as the Framers intended, such matters would be left to state and local authorities. And even if the Davidians were suspected of violating a state gun law, it's hard to imagine someone like Sheriff Harwell staging a massive raid to obtain evidence of this victimless crime. If he wanted to serve a warrant, he probably would have just knocked on the door. Since the Davidians had never threatened their neighbors, he might even have let the whole thing slide. "They had different beliefs than others," he says in *Waco: The Rules of Engagement*, "but basically, they were good people. I was around them quite a lot. They were always nice, mannerly. They minded their own business. They were never overbearing." The federal government could have taken a lesson from the Davidians.

Jacob Sullum (jsullum@reason.com) is a senior editor of REASON.

Where do you look for Liberty?

People once turned to the ACLU when government violated their rights. But no longer. As that group fights to create a "right" to welfare, to preserve racial preferences, and to kill school choice, people increasingly seek a principled alternative that will protect individual liberty, not expand government.

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A Trip to the Market

By Brink Lindsey

The Commanding Heights: The Battle Between Government and the Marketplace That Is Remaking the Modern World, by Daniel Yergin and Joseph Stanislaw, New York: Simon & Schuster, 391 pages, $26.00

If you're depressed about the state of politics these days, read *The Commanding Heights.* Forget about the Republicans' fecklessness for a while. Take a break from Bill Clinton's Rasputin act. Step back and look at the big picture, a picture that spans the whole planet and comes into focus over decades. Look at the big picture and see that our side—the side of human freedom—is winning.

In *The Commanding Heights*, Daniel Yergin, author of *The Prize: The Epic Quest for Oil, Money & Power*, and Joseph Stanislaw, Yergin's colleague at Cambridge Energy Research Associates, chronicle the global rise and fall of government control over the economy. Their narrative covers the past half-century, beginning with the Labour Party's big victory in Britain at the close of World War II and concluding with the still-unfolding Asian currency crisis. The theme is a simple one: Through bitter and repeated experience, faith in "government knowledge" and anxiety about "market failure" have given way to trust in "market knowledge" and wariness of "government failure." As a result, market forces are retaking the "commanding heights" of the economy (Lenin's phrase) that governments had stormed and captured.

The Commanding Heights is a solid book, though not a great one. The prose is clear and taut, but lacking in style or wit. With subject matter of such epic sweep, it's a shame the storytelling is so flat. And though the authors pay attention to thinkers as well as doers, their presentation and analysis of ideas is uniformly shallow. All told, *The Commanding Heights* reads like a gigantic newspaper article.

But it's a well-reported newspaper article, and it gets the story straight. The book rests not only on a fat bibliography but also on extensive interviews with dozens of the key players in the drama: Pedro Aspe, Gary Becker, Stephen Breyer, Domingo Cavallo, Milton Friedman, Alberto Fujimori, Yegor Gaidar, Mahathir Mohamad, Jeffrey Sachs, Margaret Thatcher, and Paul Volcker headline the gaudy list. Yergin and Stanislaw synthesize their research into a well-paced story filled with interesting details and anecdotes, exposing socialism's broken promises and celebrating the market's creative power.

It's hard to believe how far we've come in 50 years. When Winston Churchill was unceremoniously dumped in favor of Clement Attlee in the spring of 1945, the Soviet Union served as the economic (if not political) model for Labour's plans to rebuild Britain. As historian E.H. Carr wrote around that time, "Certainly, if 'we are all planners now,' this is largely the result, conscious or unconscious, of the impact of Soviet practice and Soviet achievement." The free market was an anachronism; central planning was the wave of the future. For his part, Attlee referred to belief in the private profit system as "a pathetic faith resting on no foundation of experience."

The theme is a simple one: Through bitter and repeated experience, faith in "government knowledge" and anxiety about "market failure" have given way to trust in "market knowledge" and wariness of "government failure."

Things were little different across the Channel. Charles de Gaulle declared in 1945 that "the state must hold the levers of command." Historian A.J.P. Taylor surveyed the intellectual scene of the time and concluded: "Nobody in Europe believes in the American way of life—that is, in private enterprise. Or rather those who believe in it are a defeated party and a party which seems to have no more future than the Jacobites in England after 1688."

Faith in planning seized the imagination of leaders around the world. In India, Jawaharlal Nehru proclaimed that "the Soviet Revolution had advanced human society by a great leap and had lit a bright flame which could not be smothered and that it laid the foundation for a new civilization toward which the world could advance." At least India's leaders were committed to democracy. Elsewhere in the developing world, China, Cuba, and others followed the Soviet model all the way to totalitarian communism.

The founders of the new mixed economies, like their communist cousins, believed that state-owned industries would lead the way toward modernization and growth. The chaos of the marketplace could not be relied upon to mobilize the necessary investments or to create enterprises of sufficient scale. Nationalized industries would be more efficient and more technologically advanced; their joint efforts could be coordinated by central planners to produce full employment and prosperity for all.

In much of the developing world, planning and state ownership were embellished with enforced economic isolation. Foreign investment by Western multinationals was shunned as exploitation or "neocolonialism." Even exports to the industrialized world were seen as a trap. According to the theory of *dependencia*, which held sway throughout Latin America, international trade locked developing countries into a subservient role as suppliers of cheap farm goods and raw materials. In this view, the benefits of trade flowed one way: from the commodity-producing "periphery" to the industrialized "center." True economic development would come to the Third World only through protectionist "import substitution" policies that encouraged industrialization at home.

Of course, the triumph of statism was not uniform. The United States avoided widespread nationalizations, preferring instead to address perceived market failures through antitrust law and economic regulation. Germany, under the influence

The Original Price Girl: Where Margaret Thatcher opted for markets, post-WWII British Prime Minister Clement Attlee had put his money on the Soviet economic model.

of Ordoliberals like Wilhelm Röpke and Alexander Rüstow, rejected top-down planning in favor of corporatist consultation and a "social market economy." And Japan, followed by other countries in East Asia, embraced the world economy in pursuit of export-led growth.

Meanwhile, a tiny intellectual minority resisted the general socialist clamor and maintained allegiance to the free market. Yergin and Stanislaw tell the story, doubtless familiar to many REASON readers, of F.A. Hayek, the Mont Pelerin Society, and the rise of the Chicago school.

Hayek, a socialist in his youth, was converted to the free-market camp by Ludwig von Mises in the 1920s. In the '30s, he attained a kind of professionally suicidal prominence through his futile struggle against John Maynard Keynes's growing influence. Having lost that battle, he began to win the war—first, in 1944, with the popular *The Road to Serfdom*; and then, in 1960, with his masterwork, *The Constitution of Liberty*. As Yergin and Stanislaw write: "In the postwar years, Keynes's theories of government management of the economy appeared unassailable. But a half-century later, it is Keynes who has been toppled and Hayek, the fierce advocate of free markets, who is preeminent."

Hayek exerted his influence not only through his writings but also by reaching out to like-minded thinkers. In 1947 he helped organize a meeting of 36 free market intellectuals at a Swiss resort on Mont Pelerin. The gathering turned into an institution—the Mont Pelerin Society—whose biennial get-togethers helped to create an international network of classical liberal scholars.

One of the attendees at that first Mont Pelerin meeting was Milton Friedman of the University of Chicago, who was making his first trip to Europe. Friedman, of course, went on to become the most famous member of the so-called Chicago school of economics, which included George Stigler, Gary Becker, and a host of other free market luminaries (actually, Hayek spent a dozen years at Chicago, though interestingly not on the economics faculty). The intellectual ascendancy of the Chicago school may be measured in Nobel Prizes: Since 1974, eight Chicago professors and another 11 who had some association with the university have won the Nobel Prize in economics.

How did it happen that the ideas of a courageous few ultimately changed the world? Broadly speaking, the past half-century served as a vast and tragic social science experiment, in which the hypothesis of central planning's superiority to markets was tested and decisively repudiated. The fall of the Soviet Union on the one hand, and the rise of East Asia on the other, were the two most important data points that exploded the statist worldview. "Between the fall of the Berlin Wall and the collapse of the Soviet Union in 1991," a senior economic official in India admitted, "I felt as though I were awakening from a thirty-five-year dream. Everything I had believed about economic systems and had tried to implement was wrong."

Yergin and Stanislaw pile example upon example of socialism's shining ide-

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als gone awry. My favorite is their account of the Hindustan Fertilizer Corporation in India: "In 1991, at the time of the economic crisis, its twelve hundred employees were clocking in every day, as they had since the plant had officially opened a dozen years earlier. The only problem was that the plant had yet to produce any fertilizer for sale. It had been built between 1971 and 1979, using considerable public funds, with machinery from Germany, Czechoslovakia, Poland, and a half-dozen other countries. The equipment had looked like a great bargain to the civil servants who made the basic decisions, because it could be financed with export credits. Alas, the machinery did not fit together and the plant could not operate. Everyone just pretended it was operating." After a while, even true believers lose their faith in the face of such evidence.

Of course, the specific events by which the ideas of a few dissident economists came to topple governments and change the course of history looked nothing like a neat and tidy scientific experiment. In the exceptional case, the path from ideas to practice was direct. Yergin and Stanislaw relate a mid-'70s visit by the new Conservative leader Margaret Thatcher to the party's research department. She got into an argument with a staffer who was preparing a paper advocating a middle way between left and right; reaching into her briefcase, she pulled out a copy of Hayek's *The Constitution of Liberty* and held it aloft. "This," she said, "is what we believe."

Much more often, though, freedom's resurgence received aid from unexpected quarters. Mikhail Gorbachev broke up the Soviet Empire while trying to revive it. Deng Xiaoping unleashed market forces that lifted 200 million people out of poverty in two decades, all in the name of the Communist Party. Carlos Salinas, a creature of Mexico's corrupt PRI who came to power in an apparently rigged election, swept away trade barriers and privatized industries. In Peru, Mario Vargas Llosa was a dedicated believer in economic freedom, but he lost the election; instead, Alberto Fujimori, an obscure agricultural engineer, won the presidency and led his country through dramatic market reforms. New Zealand's sweeping liberalization during the mid-'80s came under a Labour government. Airline deregulation in the United States was launched by Stephen Breyer, now a Supreme Court justice and then a staffer for Sen. Ted Kennedy. And so on.

Indeed, Yergin and Stanislaw's account highlights the crucial importance of sheer accident in the historical process. A flap over a reference to U.S. food aid as "chicken feed" led Gen. Lucius Clay to fire the German director of economic administration in the American and British occupied zones; Clay replaced him with Ludwig Erhard, whose snap elimination of price controls launched the German *Wirtschaftswunder*. The election of a Polish pope—the first non-Italian in centuries—proved vital in nurturing the Solidarity movement in Poland and sustaining it after the 1981 crackdown. The Falklands War, a third-rate conflict in military terms, catalyzed reform in both the combatant countries; victory gave Thatcher the popular support she needed to launch a full-scale privatization drive, while defeat spelled the end of the generals' rule in Argentina and the eventual embrace of market reforms—by, of all people, a Peronist president, Carlos Menem.

So when you put down *The Commanding Heights* and descend again into the drift and mediocrity of today's headlines, don't despair. Keep your focus on the larger view that Yergin and Stanislaw have sketched. Remember that over the past half-century, the ideas of liberty have survived near-extinction to gain worldwide acceptance. The struggle between state and market for the commanding heights continues, and doubtless the cause of freedom will suffer setbacks and reverses. Nevertheless, there is firm ground for optimism in the realization that, whether by exceptional leadership, or by assistance from unlikely champions, or simply by accident, good things happen to good ideas.

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Generous to a Fault?

By Loren Lomasky

Generosity: Virtue in Civil Society, by Tibor Machan, Washington, D.C.: Cato Institute, 116 pages, $16.95/$8.95 paper

My friend the economist was puzzled, but only for a minute. Our flight was almost full, and the young family who boarded late had not been seated together. The mother and baby had a middle seat across from us, and the father was seated in another middle seat some rows to the rear. But before takeoff the seating arrangements changed; the passenger on the aisle next to the father had traded his seat for the mother's.

An unexceptional incident? Yes, unless you happen to be an economist trained at the University of Chicago. With a straight face I opined, "Looks to me like market failure." This secured my friend's attention. "That fellow gave up the better seat without compensation," I continued. "Don't you think it would be more efficient to have a market in passenger seat rights?"

While mulling this over the economist muttered some ritual phrases about "transaction costs" and "informational asymmetries." That, though, was wheelspinning. Eventually he offered two suggestions. First, the passenger who offered the seat exchange may have done so to avoid feelings of guilt (and to avoid replacing guilt with embarrassment he did not ask for compensation). Second, the passenger may have given up the better seat because coming to the rescue of the separated family gave him pleasure. (The economist said "positive psychic returns," but I'm pretty sure this is what he meant.)

This was explanation enough for my friend; subsequently we chatted about design possibilities for airplane-seat auctions and the failings of the Republicans. But this would not have been enough for the distinguished libertarian philosopher

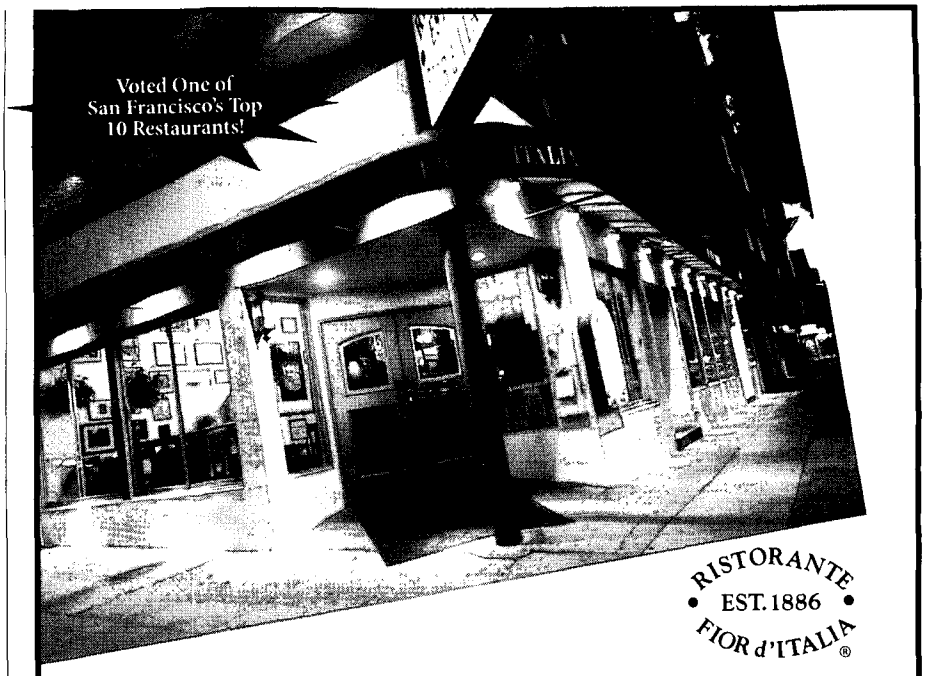
Tibor Machan, who in his latest book provides a simpler and altogether more intuitively satisfying answer: The passenger acted out of generosity.

Couldn't any schoolboy have come up with the same answer? No doubt that's true, but for philosophers (and economists) it isn't so easy. There are basically two reasons why that is so. One is the suspicion that authentically generous action does not exist—that despite appearances, whatever people elect to do is motivated by the relentless pursuit of self-interest. The other is that even if individuals do from time to time act for the sake of others' well-being instead of their own, they are thereby rendering themselves suckers, dupes, inadequate agents of their own flourishing. On the one hand, generosity

Machan rejects the propositions that generosity doesn't exist and that generosity is a mug's game. He also emphatically rejects the proposition that the welfare state is superior to voluntary action as an instrument for meeting human needs.

is deemed to be impossible, and on the other, it is thought to be irrational. Whichever fork is taken, generosity becomes problematic and manifests a political dimension: If people are not in fact generous, or if they are ill-advised to act generously, then institutionalized and coercive mechanisms will be needed to address social problems. The name for those mechanisms is, of course, the welfare state.

Machan rejects the propositions that generosity doesn't exist and that generosity is a mug's game. He also emphatically rejects the proposition that the welfare state is superior to voluntary action as an instrument for meeting human needs. On all counts he is thoroughly persuasive. Generosity may not be the highest of the virtues, and it certainly isn't the only virtue, but it is a crucial piece of the puzzle of living a good human life among others. Thus,



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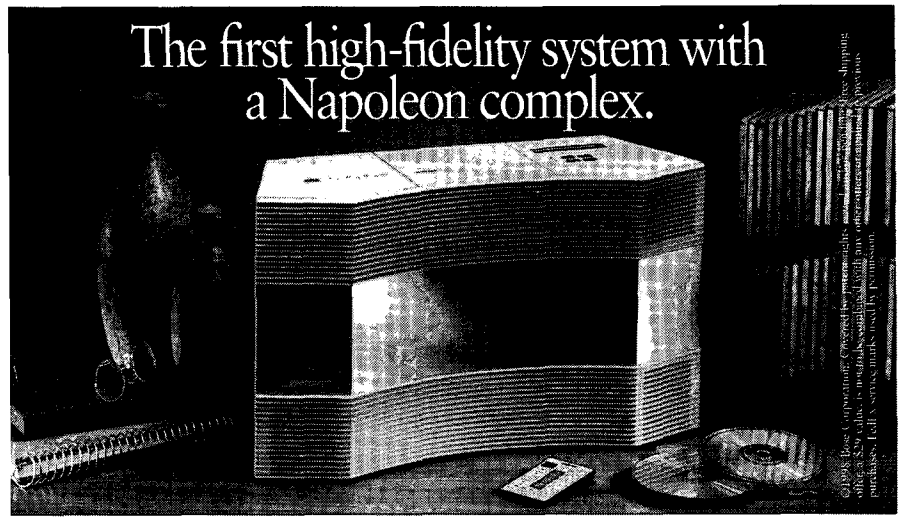

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that which impedes the free flow of generous behavior damages people. That is Machan's chief indictment of the welfare state. By substituting the drear hand of mechanistic bureaucracy for private compassionate acts, society is literally demoralized. Notwithstanding contrived political rhetoric to the contrary, governments are incapable of being kind or compassionate because these are moral stances the existence of which presupposes free choice. Even apart from questions of effectiveness, coerced transfers negate choice and thereby deprive individuals of opportunities to open their hearts—and their pocketbooks—to their fellows.

This is a novel and insightful critique of the welfare state, but Machan overplays his hand when he claims that "despite all the rhetoric about compassion, kindness, and charity, supporters of the welfare state in effect make it impossible for citizens to be compassionate, kind, and charitable." That, for better or worse, is to give much too much credit to the enemy. Has public education eradicated ignorance, has public housing wiped out slums and homelessness, have transfer programs banished poverty and hunger? Not in this world. So there is no paucity of opportunities for acting generously toward those who have fallen through the cracks—or canyons—of the welfare state. That isn't to dismiss Machan's indictment, but rather to agree with scholars such as Charles Murray and Marvin Olasky that the demoralization occasioned by the welfare state predominantly falls on its alleged beneficiaries.

Underlying these political debates is a foundational moral question: Why is it good to be generous? For those who take morality to be a studied exercise in impartiality among persons, the answer comes quickly enough. Generous people act to secure the greater good in place of the lesser good, even if the lesser good forgone is one's own and the greater good accrues to someone else. Machan, however, heavily influenced by Aristotle and Ayn Rand, vociferously rejects impartiality as the be-all and end-all of ethical life. Rather, the overriding moral task for the individual is to flourish in his own activities. From this perspective, making the case for generosity as a virtue is no easy task. For those (like myself) who concur with Machan's rejection of impartialism, there is considerable interest in seeing how smoothly he can motor his way along this alternate route to generosity.

There are, I think, bumps along the way. "Generosity," claims Machan, "is a good trait because practicing it makes us more at home with the world." Insofar as we are generous "we contribute to the positive upkeep and improvement of the community that can make a more hospitable setting for our own life." But while this may be true on many, even most occasions, it misses the distinctive point of generosity. If I act generously toward others I am endeavoring to make *their* world more hospitable. Benefits accruing to me are side effects. They are not what one primarily aims at—if they are, the conduct by definition is not generous. By analogy, when I paint my house and landscape my garden I enhance my neighbors' property values, but it would be seriously misleading to say that what I was doing was trying to make them richer.

In the book's epilogue Machan offers this Aristotelian variation: "Generosity is morally virtuous because we are essentially social beings with the prospect of intimate human relationships enhancing our lives, and because we can ennoble ourselves by supporting others." The problem with this claim is not that it is false but that it begs the question. We ennoble ourselves by acting generously only if generosity is indeed a virtue—the proposition that is to be established. Social beings do enjoy helping others out in a pinch. But to take pleasure from making things go better for others presupposes that one independently values their well-being, else there would be no pleasure in helping them. What we need to be told is why this way of securing pleasure is especially meritorious. Both Machan and my friend the economist have put the self-interested cart before the other-regarding horse. That is why their answers are unconvincing.

Does it follow that unless we concede victory to the impartialists, generosity turns out to be a sham virtue? I think not. With Machan, we can reject the demand that we set our own interests and projects on a par with those of all others. We are rationally entitled to lend to the one life we live our primary attention. Primacy is one thing, though, and exclusivity quite another. Because we recognize that the weal and woe of others is as real as our own, we also recognize that factors bearing on their well-being should enter into our own practical accounting, albeit not with the same weighting that one's own good (and that of one's loved ones) carries. To count oneself as one and others as zero would be to fall into a kind of moral solipsism. The generous person is not solipsistic. He expresses his recognition of others' status as

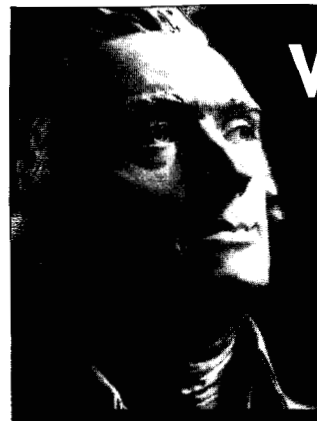
MIKE LUCKOVICH

persons with ends of their own rather than mere things by forgoing from time to time his own satisfactions so that others can benefit. This isn't masochism or heroic self-sacrifice. It's no more and no less than generosity.

Machan possesses the resources to offer a similar analysis, but he holds back because he remains under the spell of the philosophical theory of "ethical egoism." According to the egoist, one ought to act in the way that most advances one's own good. The strict implication of this is that one may accord no weight whatsoever to the interests of others if doing so diminishes, even by an iota, one's own interests. The best known recent exponent of egoism is Rand and, with implacable consistency, she proceeded to announce that selfishness is a virtue. Perhaps Rand believed that this was the only approach compatible with a rejection of impartialism. If so, she was mistaken, just as she was about the status of selfishness. Selfish people are not generous, and it is generosity rather than selfishness that is a virtue. Machan perceives that that is so, but not with sufficient clarity to lead him to jettison the constricting egoistic framework.

Machan's analysis could have been sharpened had he availed himself of the insights of philosophers outside the Aristotle/Rand axis, especially the 18th-century Scottish theorists David Hume and Adam Smith. Unfortunately, he takes them on not as collaborators but competitors, in the process significantly distorting their views. Hume is presented as denying the existence of free will and reducing human behavior to the tugs and pulls of sentiment. To the contrary, Hume affirms free choice, albeit basing it on a different theory of free will than that favored by Machan. For Hume, generosity springs from a natural beneficence that is inherent in all normally functioning human beings, but that in no way precludes the voluntary status of generous actions.

Smith is mischaracterized even more seriously as someone for whom "it is a matter of calculation whether one will engage in social relationships." Rather, Smith maintains in *The Theory of Moral Sentiments* that one's sense of self and one's conscience (poetically labeled "the man within the breast") is from earliest



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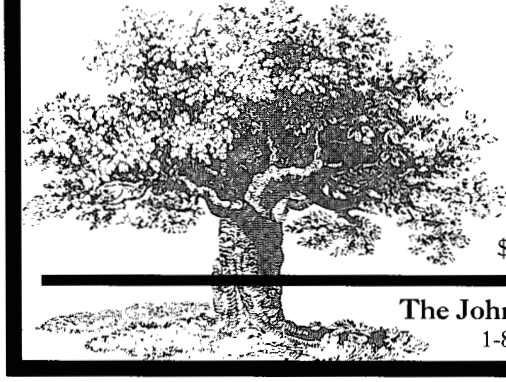

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childhood grounded on recognition of and regard for the attitudes of others. No less for Smith than Aristotle are human beings social animals. Any theory of generosity could benefit from careful study of his nuanced, sensitive account of how individuals come to modulate their passions and live decently among others.

These are not the only adversaries with whom Machan is a bit too fast and loose. John Rawls's "intuitionism" is held up for criticism, but that Rawls explicitly rejected the claims of intuitionism as a theory of justice passes without mention. Rawls's philosophical forebear, Immanuel Kant, is also presented in tendentious fashion. There is perhaps some irony to the fact that a work of advocacy for the virtue of generosity is less than generous in its representations of other theorists' views. I bring this up not because scholarly pedantry is fun (although I must confess that it often is) but because the consequence of Machan's partisanship is a less illuminating analysis than might otherwise have been achieved. Still, this commendably concise and readable volume takes important strides toward clarifying the place of a crucial civic virtue. To suggest otherwise would be, well, ungenerous.

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Getting Beyond Racism

By John Hood

America in Black and White: One Nation Indivisible, by Stephan Thernstrom and Abigail Thernstrom, New York: Simon & Schuster, 704 pages, $32.50

Bill Clinton is a profoundly silly and trivial man. To come to this conclusion, you need not believe Monica Lewinsky, Gennifer Flowers, *The New York Times*, and the vast right-wing conspiracy that funds them, controls them, and brings them coffee. All you need to remember is how Bill Clinton arched his eyebrows, deepened his drawl, and wagged his finger at Manhattan Institute scholar Abigail Thernstrom last January at the University of Akron. In that celebrated exchange, part of the president's national "conversation" on race, Clinton—impersonating Geraldo Rivera on a bad day—asked participants whether they supported affirmative action in higher education. Thernstrom interjected, correctly, that the real question was whether racial preferences, not some vague concept of "affirmative action," ought to continue.

"Abigail," said the president in mock familiarity, towering over her as she sat in her chair, "do you favor the United States Army abolishing the affirmative action program that produced Colin Powell?" When she hesitated, he pressed on. "Yes or no?" he demanded. "Yes or no?"

What *America in Black and White* shows is that, to the extent a problem persists in social relations among whites, blacks, and other minorities, it is only exacerbated by race-conscious public policies such as preferential admissions and minority contracting goals.

Thernstrom refused to take the bait, and began: "I do not think that it is racial preferences that made Colin Powell...."

"*He* thinks he was helped by it," the president interrupted.

This is, apparently, the kind of conversation that the president would like to foster on race: superficial, bullying, and misleading. That Thernstrom wouldn't play along will come as no surprise to readers of *America in Black and White: One Nation Indivisible*, the new book she wrote with her husband, Stephan, a Harvard historian. *America in Black and White* is long (704 pages with notes), detailed, and full of numbers. It is also one of those books likely to end up dog-eared, worn, and kept within the easy reach of journalists, policy analysts, and others interested in these issues. It's a magnum opus that, one might hope, will do for issues of race what *Losing Ground* did for welfare policy or *Capitalism and Freedom* did for free market economics—that is, move an important issue out of elite discussion and into public view, helping to shape attitudes and opinions over time.

If it's about race, it's in here. The Thernstroms examine affirmative action, desegregation, busing, college admissions, redistricting, employment, poverty, housing, and culture. While the picture they paint of race relations and racial progress is complex, it is ultimately rosy. The gap between blacks and whites has shrunk dramatically in many areas, from incomes and living standards to educational attainment. This fails to comport with the world view of worrywarts, liberal and conservative, who view the racial divide as yawning and possibly unbridgeable. Many problems remain, of course, but the Thernstroms persuasively argue that to deny the past five decades of progress is to prevent serious debate about what remains to be done.

As a compendium of statistics and trends, the book is unsurpassed in its breadth and depth. Indeed, the only quibble that I have with *America in Black and White* is that, in some places, the intensity and complexity of the argument seemed like overkill. I felt as if, having already been pinned on the mat, I was being pummeled about the face and neck with a seemingly ceaseless flurry of jabs. Of course, I hadn't put up much of a struggle in the first place. Surely other readers need convincing a lot more than I do—and if their minds are open, the Thernstroms will persuade them.

As I read the book, I marked nuggets of unique insight about the sometimes surprising course of race relations, particularly as it intersects politics. The Thernstroms begin with an excellent history of

slavery and Jim Crow segregation, the details of which still have the power to shock us today. One interesting fact they report is that while Southern hotel operators and (after some early resistance) bus and streetcar companies acquiesced to segregation—the power of white social consensus overcoming the search for profit—gas stations never did (except in their restrooms). "Filling up the tank was such a transitory and impersonal experience that service station operators would not sacrifice profits in order to indulge their prejudices," they write. Indeed, the advent of the automobile in the 1920s threatened much of the segregationist order, leading many cities and towns to attempt to impose "racial rights-of-way" at intersections and on lanes. It never really worked—reflecting, if you think about it, the natural tendency of the automobile to promote personal freedom in contrast to mass transit's susceptibility to social or political control.

Throughout the book, the Thernstroms challenge simplistic assumptions about the political and economic history of race. I didn't know, for instance, that right after the *Brown v. Board of Education* decision, a Gallup poll found that black Americans were almost evenly split as to the wisdom of school desegregation, many either resentful of the "proximity theory" that black kids could learn only with white kids nearby or suspicious of efforts to dismantle the black public schools that had long been important institutions, and employers, in black communities.

Similarly, the Thernstroms discuss black ambivalence toward Roosevelt's New Deal. Though it coincided with increased black support for the Democratic Party, in many cases the New Deal harmed black economic interests—for example, by imposing a minimum wage that led to massive unemployment in the Southern tobacco industry. The black press even referred to the National Recovery Act, which may have thrown half a million blacks out of work, as the "Negro Removal Act." Even so, the black voting population that had backed Herbert Hoover in 1932 had by 1936 become one of Roosevelt's strongest bases of support. The authors ascribe the change more to the liberal views of FDR's advisers, such as his wife, Eleanor, and Interior Secretary Harold Ickes, than to the economic policies they designed and carried out. Also helping to change attitudes was the president's tacit policy of increasing employment of blacks in federal agencies.

Still, the political allegiances of many prominent leaders of the emerging civil rights movement remained complex. When Jack Kennedy ran for president, he met with Martin Luther King Jr. to solicit his support. King's father was a Republican, and the younger King said that he could not see "that there was much difference between Kennedy and Nixon." He declined to endorse either. But subsequent events proved Nixon's downfall. A couple of weeks before the election, a Georgia judge threw the younger King in jail for a traffic violation. Kennedy called Coretta

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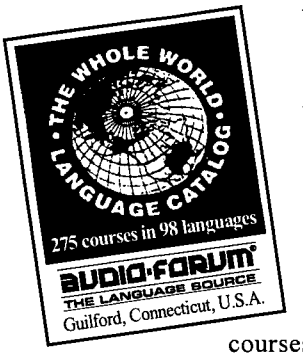

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Scott King to express his sympathy, while Bobby Kennedy persuaded the judge to spring him. Nixon, meanwhile, chose to remain silent, resisting the entreaty of baseball great Jackie Robinson, a Nixon supporter. "On election day Martin Luther King, Sr. voted for Kennedy, and so did hundreds of thousands of other African Americans," the Thernstroms write. This represented a modest jump in black support for the Democratic ticket—about nine percentage points—but enough to account for Kennedy's slim margin of victory.

Of course, the flip side of growing black support for Democrats was increasing Republican strength among whites. Southern white voters began the trend in the early 1960s, but as the decade progressed, and in particular after the civil rights acts of 1964 and 1965, many Northern whites grew uneasy about federal policy, too. In February 1964, only 28 percent of Northern whites thought the administration was moving too fast on integration, but by September 1966 more than half thought so. While Kennedy had received 61 percent of votes cast by white unskilled or semiskilled workers, Hubert Humphrey received only 38 percent of such votes, the remainder going to Nixon or George Wallace. By 1972, even traditionally Democratic union members chose Nixon over George McGovern.

There were other issues in these races, of course, but disaffection with policies such as forced busing clearly hurt the Democrats among whites. Fortunately, these race-based political trends have begun to burn out, according to the Thernstroms. Majority-white cities and states are now electing black mayors or governors, and some Republican statewide candidates are polling well among blacks (Gov. George Voinovich of Ohio got about 42 percent of the black vote in his last bid for reelection).

The Thernstroms are at their best in marshaling economic and social science research to disprove the nostrums of modern racial liberalism: that blacks haven't made much progress in the past three decades, that the progress that has been made was because of racial preferences, and that racial discrimination is the most important explanation for continuing gaps between whites and blacks in income, wealth, education, and other measures of social well-being. For example, the black poverty rate fell from 87 percent in 1940 to 30 percent in 1970, and by 1995 had slipped further to 26 percent. This remarkable change can hardly be ascribed to anti-discrimination laws or affirmative action policies that weren't implemented until the late 1960s.

America in Black and White: While the details of Jim Crow still have the power to shock, the Thernstroms disprove the nostrums of modern racial liberalism: that blacks haven't made much progress and that the progress they have made is due to racial preferences.

The news is not all good, however. After all, the white poverty rate in 1995 was only 9 percent. Why the continued disparity? The Thernstroms persuasively argue that the decline in marriage and the corresponding increase in out-of-wedlock births, occurring nationwide but reaching far higher levels among blacks, explain the persistence of the poverty disparity far more than other factors.

They also report the sad news that after converging since good national tests began in the early 1970s, the reading and math scores of whites and blacks began widening again in the mid-1980s, possibly because of increasing school violence and a growing unwillingness to apply rigorous academic standards to blacks. (They make a plausible case, but properly admit that no one yet knows precisely why this is happening.)

The Thernstroms puncture holes in every defense of racial preference in higher education. This is probably the best part of the book. Even if you tossed out the SAT and high school grades and focused only on extracurricular activities and socioeconomic factors, the numbers of blacks in elite institutions of higher education would be much lower than they are. This is not to say they would be shut out of colleges: The vast majority of colleges and universities have a noncompetitive admissions process; if you apply and have minimal qualifications, you get in.

For whatever reason, black high school students aren't being prepared well in high school for the few hundred competitive schools that do exist: They aren't taking college prep courses, they aren't keeping their grades up, and they aren't developing the other experiences or skills necessary to get in on their merits. This isn't just because of incomes; on the SAT, even poor whites on average score better than black students from relatively wealthy families. Rather than dealing with this difficult problem, university leaders are pretending it doesn't exist. They admit students who are demonstrably unprepared for their college coursework and either fail

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to graduate them or further lower academic standards so they can.

For the 1989–1990 college freshman class, 60 percent of black students failed to graduate within six years, compared to 40 percent of whites. When colleges attempt to display their social commitment by admitting high-risk students from minority groups, it is the students who suffer when the risks don't pan out. The schools may feel better for demonstrating enlightened racial attitudes, but many of the presumed beneficiaries end up worse off.

In many cases, colleges defend their policies by citing the need for diversity, as if this goal is more important than scholastic rigor. The nation's competitive colleges are, in effect, playing a crude racial counting game—either because of the ideological pretensions of their faculties and leaders or because they think they have no choice—and the Thernstroms heap deserved scorn on it.

While the Thernstroms are fastidious about documenting their arguments, there is one important area in which they are generally unconvincing. As a native Southerner who has had many a locker-room conversation, I don't share the Thernstroms' trust of public opinion polls in identifying improvements in racial attitudes. Lots of white people retain prejudices, of varying degrees of magnitude and kind. Probably lots of black people do, too. They just don't share them with pollsters.

Still, what *America in Black and White* shows is that, to the extent a problem persists in social relations among whites, blacks, and other minorities, it is only exacerbated by race-conscious public policies such as preferential admissions and minority contracting goals. Modern liberals celebrate the statement of Justice Harry Blackmun, in the infamous *Bakke* case on college admissions, that "in order to get beyond racism, we must first take account of race"—even though it is self-evidently moronic. In public policy, getting beyond race means getting beyond race. Nothing less.

Contributing Editor John Hood (locke@interpath.com) is president of the John Locke Foundation and author of The Heroic Enterprise: Business and the Common Good *(The Free Press).*

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French Lessons

Jospin removes *laissez faire* from the vocabulary.

By Thomas W. Hazlett

The French countryside offers classical treats, *sur-la-mer* is paradise in a can, and Paris is the quintessential cosmopolitan mecca. France is a splendid and romantic country filled with idyllic settings, culinary masterpieces of astonishing deliciousness—and always a tasty red or white with which to wash it down.

And then there are the French people—an annoying lot who, when discussing the affairs of state, abandon civilized norms and become a species quite apart from Western Man. Their geopolitical aim is, by revealed preference, to play host to the German Army while spewing an unending stream of expletives at their allies and liberators. Indeed, the French have become so obsessed with reviling everything Yankees love, and vice versa, that they now devote a substantial portion of GDP to shooting down American phrases that cross into their air space.

In politics, too, the children of Charlemagne march to a different drummer, celebrating the triumph of markets and the collapse of Soviet communism by making a hard left turn into the dustbin of history. The government elected last June is an unabashed coalition of Socialists and Communists, a merry band of statists who promise the working man salvation in a shorter work week at full pay and who insist that the term *private industry* be put on that list of banned foreign expressions. Radicals led by Lionel Jospin swept into office to restore that bright shining commune on a hill.

Well, that was the plan. Unemployment remains a double-digit demon terrorizing the French economy—indeed, it has not dipped below 12 percent for three years. This is a great mystery to the French left, true believers who no doubt assume that a vast, right-wing conspiracy is shrinking their just society's employment base to punish the activists for their kind hearts and noble nature.

In fact, the republic has instituted what amounts to a series of Job Elimination Acts: Jobless benefits rival the wages of low-skilled work, while labor law has made the act of employing workers as joyful as a trip to the dentist. The state extracts huge sums in payroll taxes and lets the bureaucracy drill on any employer who attempts to terminate a labor contract prior to death by natural causes.

And don't forget the really serious commitment to high minimum wages in France. In 1993, the cheapest French worker cost employers $9.50 per hour, with workers receiving $7.10 in wages. (The U.S. minimum wage at the time was $3.65.) Economists are shocked—*shocked*—to find French unemployment running 12.4 percent.

Still, truth be told, Jospin has turned out to be something more than a real Socialist—he is a real *politician.* Since gaining office, he has felt little compunction to actually deliver the menu of left-wing policies which he had so flawlessly ticked off on the campaign trail. His first act of solidarity was to sic riot police on comrades who occupied government welfare offices to protest the high unemployment rate.

He has bent to the European Community on monetary stability, aware that the old inflationary pump priming has run dry, and has presided over the largest withering away of the state in French history. French Communists—seeing their own government sell $7 billion of France Telecom and 49 percent of Air France—must have struck the famous Native American pose, tearfully watching their beloved habitat despoiled by evil modern forces.

That's not to say Jospin has severed his left hand. As *The Economist* notes, "When he makes one of his more blatant u-turns, he invariably mollifies the left by giving them some symbolic ideological bauble to play with." Socialist intellectuals really like these toys. To wit, the government's ongoing commitment to squeezing 39 hours of pay out of 35 hours of work. Perhaps next they'll legislate 27 hours to the day, with the increment designated for "family leave time."

Indeed, despite grudging attendance at weekly meetings of fiscal 12-step programs, French politicians remain loyal to statist credos on the left (Marx), in the center (de Gaulle), and on the right (Le Pen). Given its national penchant for *haute couture* and *haute cuisine,* France will be able to lag the world's post-communist renaissance in relative style and comfort, drawing down its store of capital—and well-stocked wine cellar—for decades into the 21st century.

Taxes are even now being increased, massive labor stoppages are a regular tourist attraction, and the odd Spanish grocery truck driver is beaten to a pulp by a mob of angry French farmers. View these as spasms of denial. Watching collectivists howl at the gale-force winds of economic competition, globalism, and efficiency as their ideology sinks beneath a rising tide of modern prosperity—damn those conspicuous consumers!—is becoming one of the great spectator sports of the *fin de siècle.*

Rudi Dornbush, a noted MIT economist who watches foreign markets, opines: "European policymakers are torn between common sense and a myopic denial of reality." Torn? In France, they're not even mildly bugged yet. They tout "myopic denial" during the campaign, then accommodate "common sense" in office. In the good ol' U.S. of A, we have learned something about international bond markets taming the left-side twitches of Large Leaders and their significant others. In the end, even socialists enjoy their capital gains. And take credit for ours.

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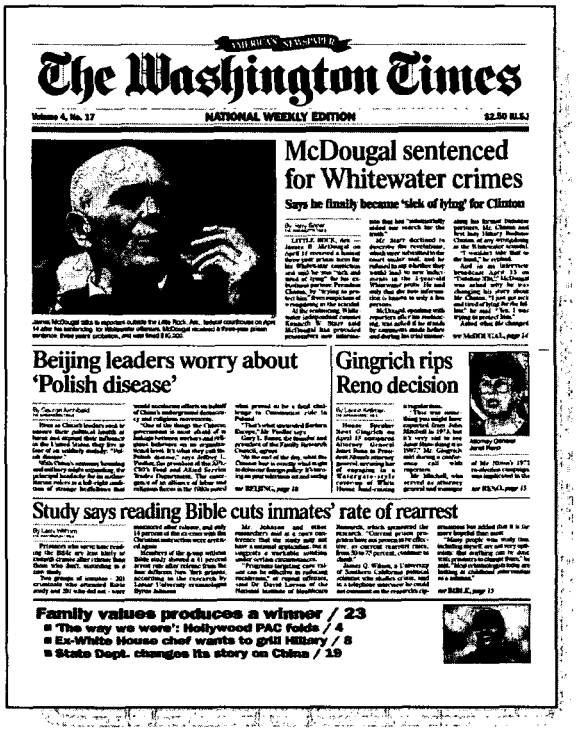
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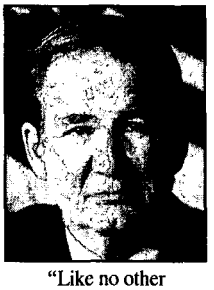

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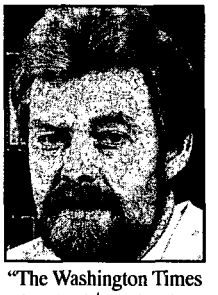

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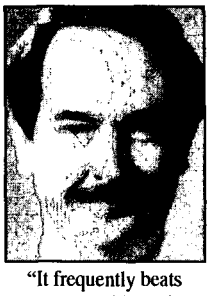

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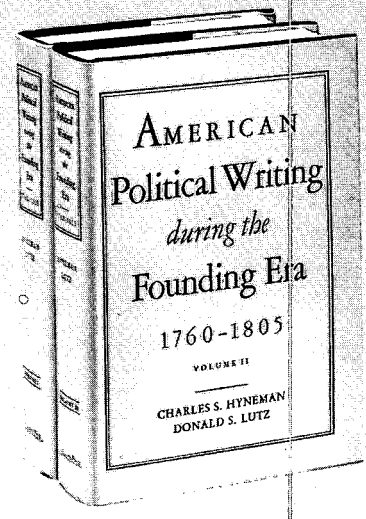

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